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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARION V. COFFRAN AND CHARLES W. COFFRAN,
Petitioners,

v.

HITCHCOCK CLINIC, INC.
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

1. Whether the court of appeals, which reversed an order granting a motion for a new trial, erred by following the "modern trend" which, by allowing greatly expanded appellate scrutiny, substantially diminishes the discretion traditionally accorded the trial court as to new trial orders.

2. Whether the court of appeals' decision reversing an order granting a motion for a new trial has so far departed from the deference typically accorded trial judges' decisions on these motions as to require an exercise of this Court's supervisory powers.

3. Whether the shift to greater appellate power to review new trial orders, which diminishes the traditional role of the trial judge in acting as an historic safeguard of the right to trial by jury, comports with the requirement of the Seventh Amendment that "the right of trial by jury shall be preserved."

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The petitioners, Marion V. Coffran and Charles W. Coffran, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on June 29, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 683 F.2d 5, and is set forth in Appendix A, *infra*, pp. 1a-12a. The opinion of the United States District Court for the District of New Hampshire is not reported; it is set forth in Appendix C, *infra*, pp. 15a-24a.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit, which was entered on June 29, 1982, is set forth in Appendix D, *infra*, p. 25a. A timely petition for rehearing was denied by an order entered on July 26, 1982. The order and accompanying memorandum appear in Appendix E, *infra*, pp. 27a-29a.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

U.S. Const. Amend. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 59(a):

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

STATEMENT

Petitioners, Marion V. Coffran and Charles W. Coffran, are citizens of the State of Vermont and residents of Windsor, Vermont. Respondent, Hitchcock Clinic, Inc., is a New Hampshire corporation with its principal place of business in Hanover, New Hampshire.

Petitioner, Marion Coffran, had two hernia operations at Mary Hitchcock Memorial Hospital in 1970, on April 15 and June 5. The operations were performed by doctors who were members of Hitchcock Clinic, Inc., respondent. For both the April and June operations, Mrs. Coffran was administered the anesthetic "halothane."

On June 18, 1970, Mrs. Coffran was readmitted to the hospital and diagnosed as having halothane-induced hepatitis. This diagnosis was confirmed by respondent's own doctors, including the anesthesiologist who had prescribed the halothane, and the gastroenterologist who has cared for her since 1970. Mrs. Coffran has permanent injuries, including severe and permanently-disabling brain damage, as a result of the hepatitis.

In 1975, Mrs. Coffran, with her husband Charles W. Coffran as co-plaintiff, brought an action against respondent and Mary Hitchcock Memorial Hospital in the United States District Court for the District of New Hampshire. The jurisdiction of the district court was invoked under 28 U.S.C. § 1332(a).

Petitioners contended that Mrs. Coffran's hepatitis was caused by the negligent administration of the anesthetic "halothane." More specifically, petitioners alleged, in part, that respondent's doctors failed to recognize facts, and failed to perform preoperative tests, which would have revealed certain "markers" of sensitivity which contraindicate the administration of halothane.

In November 1978, a jury trial was held before Judge Herbert N. Maletz of the United States Customs Court, sitting by designation. The jury returned verdicts for both defendants, after submitting four written questions indicating confusion as to the issues involved. Petitioners filed motions for judgment

notwithstanding the verdict and for a new trial. Petitioners asserted two grounds in support of their new trial motion: that the jury verdict was against the great weight of the evidence, and that the jury, as its four questions revealed, had been seriously confused so that it would be a miscarriage of justice to allow its verdict to stand.

On February 13, 1979, Judge Maletz filed an order and accompanying memorandum denying the motions for j.n.o.v., denying the new trial motion as to Mary Hitchcock Memorial Hospital, and granting the motion for a new trial as to respondent, Hitchcock Clinic, Inc. Judge Maletz found that "the jury reached a seriously erroneous result—a result which was contrary to the clear weight of the evidence and which, if allowed to stand, would constitute a patent and grave miscarriage of justice." (App. C at 23a-24a.) Judge Maletz did not address the issue of jury confusion.

Judge Maletz concluded that the clear weight of the evidence established: "either that [Mrs. Coffran's] hepatitis was caused by the halothane anesthesia which was readministered to her on June 5, 1970 (after a prior administration on April 15, 1970) or that the hepatitis preexisted the readministration of halothane on June 5, 1970 when it was aggravated by such administration." (App. C at 17a-18a.) The judge found that, under either theory, the overwhelming weight of the evidence established that an anesthesiologist employed by respondent "was negligent, if not grossly negligent, in readministering halothane to Mrs. Coffran on June 5, 1970 without giving her standard and routine pre-operative blood and laboratory tests (save for an urinalysis) prior to such readministration of halothane." (App. C at 18a.) Moreover, "[t]he clear weight of the evidence also established that in the exercise of reasonable medical care such standard tests should have included at the least a complete blood count."[1] (App. C at 18a.)

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[1] Judge Maletz paid particular attention to the failure to perform an eosinophil test. Noting that an eosinophil count of over 7% (Mrs. Coffran's count recorded in July, 1970) was abnormal, he determined, in essence, that the clear weight of the evidence established that the failure to perform this test was negligent, and that this negligence was responsible for Mrs. Coffran's injuries.

In November 1979, a second jury trial was held before Judge Loughlin, United States District Judge for the District of New Hampshire. The second trial resulted in jury verdicts for petitioners in the amount of $513,000.[2] After the district court denied motions for j.n.o.v. and, in the alternative, for a new trial, respondent appealed to the United States Court of Appeals for the First Circuit.

Respondent's sole ground for appeal was that Judge Maletz had erred in granting petitioners' motion for a new trial, after the 1978 verdicts in favor of respondent. The First Circuit agreed, vacated both the order granting a new trial and the judgments entered in the second trial, and remanded with directions that judgment be entered on the verdict in favor of the respondent.

The court of appeals stated that it could only reverse a trial judge's ruling on a motion for a new trial if it found an abuse of discretion. The court noted, however, that "the modern trend when reviewing the granting of new trials on the ground that the verdict is contrary to the great weight of the evidence is away from earlier decisions that the trial judge's discretion is virtually unlimited." (683 F.2d at 6; App. A at 2a-3a.) After its own "careful review of the record" (683 F.2d at 7; App. A at 3a), the court of appeals concluded that "the district court erred in granting [petitioners'] motion for a new trial." (683 F.2d at 7; App. A at 3a.) The court acknowledged that the trial judge had found that the jury verdict for respondent was contrary to the clear weight of the evidence, but concluded that, in its opinion, the record did not support that finding.

> Rather, while it was established that Mrs. Coffran's care was deficient in certain respects, the medical evidence was conflicting as to whether the hepatitis she contracted was causally related to those deficiencies. On the evidence presented, we do not see how a defendant's verdict could be considered as contrary to the clear weight of the evidence. Rather it reflected a jury's resolution of what was factually a very close and difficult case.

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[2] With interest and costs, the verdicts now approximate $1,000,000.

(683 F.2d at 7; App. A at 3a.)

The court of appeals discussed the two factors emphasized by the district court: "the Clinic's failure to perform an 'eosinophil count' before the June operation, and the possibility that Mrs. Coffran had contracted viral hepatitis before the June operation which was aggravated by readministration of halothane." (683 F.2d at 8; App. A at 6a.)[3] With respect to the failure to perform an eosinophil test in June, the court claimed that three distinct questions were presented: (1) does Mrs. Coffran suffer from halothane hepatitis, (2) did the omission of this test constitute a failure to provide reasonable medical care, and (3) if the test had been done, would it have shown halothane sensitivity.[4]

On the third issue—"whether the clear weight of the evidence was that had the test been done, it would have shown an abnormal reading which, in turn, would have triggered an examination leading to the use of another anesthetic"—the court of appeals "disagree[d] with the district court." (683 F.2d at 10; App. A at 9a.) The court stated that acceptance of this argument required proof of four propositions:

> (1) that an abnormally high eosinophil reading may reflect sensitivity to a variety of different drugs, as well as other conditions; (2) that Mrs. Coffran was sensitized to halothane; (3) that therefore if the test had been done, it would have shown an abnormal reading; and (4) that this abnormal reading, while

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[3] The court concluded that the latter theory could not have justified a new trial since the "aggravation" theory had not been presented to the jury.

[4] On the first issue, the court determined that it would accept, "for present purposes," that the district judge did not exceed his discretion in concluding that it would be against the clear weight of the evidence to find that Mrs. Coffran's hepatitis was not caused by halothane. On the second question, the court found "that the district court was on firm ground in concluding that the failure to give Mrs. Coffran this test was so plainly negligent that a contrary jury finding would be against the clear weight of the evidence." (683 F.2d at 10; App. A at 9a.)

> not in itself specifically pointing to halothane as the cause, would have been reason to postpone the operation, make further tests, and ultimately decide on a different anesthetic.

(683 F.2d at 10; App. A at 9a.)[5]

The court's "difficulty" centered on the third proposition, i.e, "did the clear weight of the evidence demonstrate that, in her case, the test would have been abnormal?" (683 F.2d at 10; App. A at 10a.) The court concluded: "[w]e do not think that plaintiffs carried their burden so convincingly on this point as to justify the grant of a new trial." (683 F.2d at 11; App. A at 10a.)

After examining the expert testimony on the probability that Mrs. Coffran would have exhibited an abnormal eosinphil count, the court determined that, given the testimony of respondent's expert (to which it accorded great deference based, in part, on the expert's "exceptional credentials"), it did not believe that the jury could be characterized as seriously mistaken if it chose to believe that the failure to perform the eosinophil test was not a cause of Mrs. Coffran's injuries. The court concluded:

> Given the credible expert testimony[6] that the Clinic's failure to perform an eosinophil test in June was not causally related to Mrs. Coffran's hepatitis, we must conclude that the district court abused its dis-

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[5] The court found that "[t]he first proposition was undisputed, and, while the fourth is more speculative, we shall accept it for present purposes." (683 F.2d at 10; App. A at 9a.) As to the second proposition, the court decided to "proceed on the supposition that the weight of the evidence demonstrated that her hepatitis was caused by the halothane, and that she was sensitized to it prior to June." (683 F.2d at 10; App. A at 9a-10a.)

[6] As he was entitled to do in ruling on a motion for a new trial, Judge Maletz had "evaluat[ed] . . . the quality of the evidence presented," and found that the probative weight of the testimony of respondent's expert was "lessened by a number of considerations." (App. C at 22a.) The testimony of respondent's expert had not, therefore, convinced Judge Maletz (who heard the witnesses and was in the best position to evaluate their testimony) that the jury's verdict was not seriously erroneous.

> cretion in granting a new trial on the ground that the verdict in favor of the Clinic was against the weight of the evidence. We find no basis in the record on which it could logically be concluded that the clear weight of the evidence supported an inference that had an eosinophil test been given, Mrs. Coffran's alleged susceptibility to halothane hepatitis would have been revealed.

(683 F.2d at 11; App. A at 11a-12a.)

Subsequently, petitioners filed a petition for rehearing with the First Circuit. On July 26, 1982, the court of appeals issued a memorandum and order denying the petition.[7] In its memorandum order, the court reaffirmed the substance of its earlier holding: "Plaintiffs, however, do not show that it would be reasonable to conclude that the jury would have been clearly erroneous in finding that causation was not established." (App. E at 28a.)

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Has Decided An Important Question Of Federal Law Which Should Be Settled By This Court.

A. Without this Court's guidance or approval, some federal courts of appeals have greatly expanded the scope of appellate review of rulings on new trial motions.

This Court has consistently fostered the principle that "[t]he authority to grant a new trial . . . is confided *almost entirely* to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (emphasis added). And, this Court has long adhered to the traditional rule that the courts of appeals should rarely, if ever, interfere with trial judges' rulings on new trial motions. *See, e.g., United States v. Johnson*, 327 U.S. 106; *Fairmount Glass Works v. Cub Fork Coal Co*, 287 U.S. 474.

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[7] In its memorandum, the court reiterated its earlier finding that the "aggravation" theory had not been presented to the jury. In any event, the court stated: "the great weight of the evidence does not demonstrate that defendant was negligent in failing to diagnose the hepatitis before the June 5 operation." (App. E. at 27a.)

Despite this Court's consistent pronouncements on these issues, the proper standard for appellate review of a trial judge's ruling on a motion for a new trial has been the subject of debate in the courts of appeals.[8] And, in recent years, some of these courts have brought about a considerably expanded scope of appellate review.

In the instant case, the First Circuit did state that an appellate court should only reverse an order granting a motion for a new trial when the trial judge has committed an abuse of discretion. The court emphasized, however, that it subscribed to the "modern trend" which "is away from earlier decisions that the trial judge's discretion is virtually unlimited." (683 F2d at 6; App. A at 3a.) The court admittedly exercised a closer degree of scrutiny and supervision than traditional doctrine permitted. After independently weighing the evidence, the court of appeals made its own evaluation of the credibility of witnesses. Ignoring the principle that appellate courts should be especially chary of overturning rulings on new trial motions in complex cases, the court of appeals compartmentalized the proof and based its holding on the insufficiency of the evidence on one element of petitioners' case.[9]

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[8] One leading treatise asserts that "[t]here are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2818 at 118 (1973).

[9] In addition, the First Circuit ordered reinstatement of the first jury verdict without remanding to afford the trial judge the initial opportunity to rule on a new trial issue that had been left unresolved, i.e., whether manifest jury confusion warranted a new trial. When such questions, which are appropriately addressed, in the first instance, to the trial judge's discretion, have been left unresolved, a remand is the appropriate response. The First Circuit, after independently reviewing the evidence, did conclude: "we cannot say that the record reflects such clear evidence of jury confusion as would justify either an affirmance of the grant of a new trial or a remand for clarification from the district court." (App. E at 28a-29a.) A court of appeals is, however, simply in no position to make this sort of

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The decision below illustrates the fundamental flaw in the "modern trend" towards more expansive appellate review of orders granting new trials because the verdict was against the clear weight of the evidence. The First Circuit's inquiry, i.e., engaging in a detailed evaluation of the proof and determining the weight of the credible evidence supporting each aspect of a long and complex case, necessarily impinges on the traditional *discretion* of the trial judge to grant a motion for a new trial when he—in the exercise of his professional *judgment*—determines that the case should be reconsidered by a second jury.[10]

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assessment. "Like demeanor, confusion is more readily discerned by one in a position to observe the trial. [The appellate court's] failure to find confusion would not be dispositive." *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 849 (D.C. Cir. 1981). When a nonfrivolous new trial issue invoking the exercise of the trial judge's discretion is presented, the appropriate course is to remand. *See Iacurci v. Lummus Co.*, 387 U.S. 86; *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317. The First Circuit's determination to decide this question without a remand is another indication of an overly expansive exercise of appellate review.

[10] As mentioned, the First Circuit rejected Judge Maletz's reliance on the "aggravation" theory. Although all the participants—Judge Maletz and both parties—assumed that the issue had been presented to the jury, the court of appeals concluded otherwise. Moreover, the court of appeals, in denying the Coffrans' petition for rehearing, stated: "Even if the jury had been instructed to consider this possibility, however, the great weight of the evidence does not demonstrate that defendant was negligent in failing to diagnose the hepatitis before the June 5 operation." (App. E. at 27a.) Perhaps not surprisingly, given the "modern trend" towards an expanded scope of appellate review, this passage clearly misstates the appellate role. The question is not whether the *court of appeals* believes that the great weight of the evidence supports a particular theory. The appellate role is limited to determining whether the *trial judge's* conclusion about the weight of the evidence was a clear abuse of discretion.

Traditionally, a trial judge's ruling on a motion for a new trial based on the claim that the verdict was against the weight of the evidence *was not reviewable by an appellate court.* As Judge Learned Hand stated: "[T]here may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence." *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953). In fact, this rule was "too well established to justify discussion." *Id.* In so holding, Judge Hand cited this Court's decisions in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 and *United States v. Johnson*, 327 U.S. 106. In *Fairmount*, this Court said that it would not itself review the "granting or denying a motion for a new trial for error of fact . . . ," and added: "The rule precludes likewise a review of such action by a circuit court of appeals." 287 U.S. at 481.[11]

Recently, however, some federal courts of appeals have greatly enlarged the scope of their review of rulings on new trial motions. Using a variety of theories, these courts have substan-

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[11] In *Miller v. Maryland Casualty Co.*, 40 F.2d 463, 465 (2d Cir. 1930), Judge Learned Hand, in commenting on appellate review of rulings on new trial motions based on the inadequacy of the damages awarded, questioned the desirability of reviewing such rulings for abuse of discretion:

> The trial judge decides what verdict is within the bounds of reasonable inference from the evidence. That is a question which we can consider as well as he, and which we do upon his direction of a verdict. But by hypothesis we are not to be allowed to do that; we must come at the matter at one remove, and apply the same test to the judge's decision that he applies to the jury's. We must in effect decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements.

tially eroded the deference traditionally accorded trial courts' decisions on these motions. For example, in *Lind v. Schenley Industries Inc.*, 278 F.2d 79 (3d Cir. 1960), *cert. denied*, 364 U.S. 835, which was relied upon in the decision below, the Third Circuit concluded that the traditional view that "the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial," *id.* at 90, did not apply when a new trial had been granted on the ground that the jury verdict was against the weight of the evidence.[12] According to the Third Circuit, in granting a new trial on this basis (278 F.2d at 90),

> the trial judge . . . has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.

More recent cases have identified other reasons for the gradual erosion of the policy requiring extreme deference to trial judges' rulings on motions for new trials. For example, in *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927 (5th Cir. 1982), the Fifth Circuit explained that the federal courts of appeals have been less deferential when reviewing orders *granting* motions for new trials than when reviewing orders *denying* such

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[12] In *Lind*, the court distinguished between new trials granted because the verdict was against the weight of the evidence and those granted when "something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible." 278 F.2d at 90.

motions.[13] In fact, the court stated that, in certain circumstances, the courts of appeals *independently review* the trial judge's decision.[14]

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[13] According to the Fifth Circuit, when the courts of appeals review orders *denying* motions for a new trial, all the relevant factors—deference to the trial judge who has had an opportunity to observe the witnesses and who is not limited to reviewing a cold record, deference to the jury's determination of the weight of the evidence, and the constitutional allocation to the jury of questions of fact—favor affirmance. It continued:

> When the trial judge sets aside a jury verdict and orders a new trial, however, our deference to him is in opposition to the deference due the jury. Consequently, in this circuit as in several others, we apply a broader review to orders granting new trials than to orders denying them.... And where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise particularly close scrutiny, to protect the litigants' right to a jury trial.

Shows, 671 F.2d at 930.

[14] In a passage which indicates the distance the courts of appeals have travelled from Learned Hand's position in *Portman*, the court gave a candid assessment of the current appellate practice.

> On appeal, *we review the evidence closely* to ensure that this standard has been met. We have also considered three factors that militate against new trials and require a particularly searching review of the evidence: simplicity of the issues, the extent to which the evidence is in dispute, and the absence of any pernicious or undesirable occurrence at trial.... When all three factors are present ... there is little if any, need to defer to the judge as against the jury, and we will not affirm an order granting a new trial unless on review we are satisfied, *independently*, that the jury verdict was against the great weight of the evidence.... When one or more of these factors are absent, however,... [i]t is enough ... that, in view of possible considerations not apparent from the written record, we can perceive a sound basis for the trial judge's finding the verdict against the great weight of the evidence.

Shows, 671 F.2d at 930-31 (emphasis added)(citations omitted).

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The decision below, in which the First Circuit expressed its adherence to the modern trend, is a clear example of the ever-widening scope of appellate review of rulings on motions for new trials. This Court has expressed its "difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of this Court, . . ." *United States v. Mason*, 412 U.S. 391, 396. The time has come when this innovation by some of the lower federal courts should be reviewed here.

B. The decision below, which typifies the modern trend of according little or no deference to trial judges' rulings on new trial motions, presents an issue of importance to the administration of justice in the federal system.

This Court has recently emphasized the importance of maintaining the appropriate allocation of responsibilities between the district courts and the courts of appeals.[15] It is essential to the efficient functioning of the adjudicatory process that the proper balance be maintained. The usurpation of a task properly assigned to another level can (1) seriously disrupt the traditional balance, (2) confuse the essential natures of the appellate and trial courts, and (3) increase the volume of cases

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In the instant case, two of the factors which, under the Fifth Circuit's view, militate against applying the "particularly searching review" required by the "modern trend" were present. The issues in this lengthy medical malpractice case, involving numerous hospitalizations and extensive medical testimony, were *not* simple. Furthermore, questions received from the jury during its deliberations indicated that there may have been a "pernicious or undesirable occurrence," i.e., jury confusion evidenced by its apparent failure to understand even the relatively simple aggravation theory. Thus, the First Circuit's decision to apply an increased level of scrutiny, despite the presence of these two factors, represents a major departure from the "modern trend."

[15] *See, e.g., Pullman-Standard v. Swint*, 102 S. Ct. 1781 (involving appellate circumvention of the "clearly erroneous standard" of Fed. R. Civ. P. 52(a)).

proceeding to appellate levels of decision.[16] And, of more importance in the individual case, the arrogation of a function properly assigned elsewhere typically removes decision-making authority from the tribunal best qualified to make the judgment in question.

The decision below, which reflects the sentiment that close scrutiny of trial judges' rulings on motions for a new trial is necessary to prevent usurpation of the fact-finding role which the Seventh Amendment allocates to the jury, misapprehends the thrust of the Seventh Amendment. Indeed, it stands the Amendment on its head. The ever-widening scope of appellate review, which characterizes the "modern trend," only serves to disrupt the allocation of judicial responsibilities, which is an inherent part of the right to trial by jury.

Reliance on the Seventh Amendment to support an expanded scope of appellate review of new trial orders represents a fundamental departure from the traditional teaching that the exercise of the trial judge's *duty* to grant a new trial "is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)(Parker, J.). Increased appellate interference with the trial judge's exercise of a power which has traditionally been regarded as an essential attribute of trial by jury represents a serious threat to the Seventh Amendment guarantee that "the right of trial by jury shall be preserved, . . ." U.S. Const. amend. VII.

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[16] Judge Nangle, of the Eastern District of Missouri, in a recent article, sounded "a genuine expression of alarm over the great imbalance that has developed between trial courts and appellate courts." Nangle, *The Ever-Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 Wash. U.L.Q. 409, 410-11 (1981). Although his remarks were principally addressed to another example of an overly expansive exercise of appellate review, i.e., the circumvention of Fed. R. Civ. P. 52(a), the general concerns expressed are equally applicable in this context. Judge Nangle identified a number of undesirable consequences—the general disruption of the orderly administration of justice, impairment of the confidence of litigants and the public in the decisions of the district courts, proliferation of the number of appeals, a lowering in the morale of district court judges, a decreasing likelihood of settlements, and a decline in respect for the legal system.

The trial judge, when he determines that justice requires *reconsideration* by a second jury, does not *substitute* his view of the evidence. As Judges Hastie and Kalodner said, dissenting in *Lind*:

> This traditional conception of the role of the trial judge has provided the one important limitation on the power of the jury to make an unimpeachable decision on the facts even where the evidence is conflicting. The judge may not substitute the verdict he would have rendered on the evidence for that actually rendered by the jury. But he may avoid what in his professionally trained and experienced judgment is an unjust verdict by vacating it and causing the matter to be tried again by a second jury. Thus, *the essential institution of jury trial is respected and an expedient middle ground is maintained between the absence of any control over a jury's verdict on conflicting evidence, on the one hand, and judicial usurpation of the fact finding function, on the other.*

Lind, 278 F.2d at 91 (emphasis added).

Properly understood, the appellate role, when reviewing the grant of a motion for a new trial, is simply to "see whether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict." *Lind*, 278 F.2d at 91 (Hastie and Kalodner, JJ., dissenting). A more expansive appellate review does not protect against the usurpation of the *traditional* function of the jury. On the contrary, as the dissenters in *Lind* correctly stated, the expanded scope of review "imping[es] upon the function and discretion of the trial judge in a way that is serious, regrettable and without precedent." *Id.* at 92.

In addition to being grounded in historical experience, this limited scope of appellate review is based upon a realistic assessment of the relative competence of the trial judge and the court of appeals. The decision to grant a motion for a new trial is, by its very nature, highly discretionary. The trial judge, who, unlike the appellate court, is not constrained by having to review a cold record, is in a unique position to exercise the

professional *judgment* called for by a motion for a new trial based on the ground that the verdict was against the clear weight of the evidence.

Certainly, appellate review of a trial judge's ruling on a new trial motion should not involve a detailed weighing of the evidence or an assessment of credibility, as was done by the court below in this case. The district judge, who presides over the trial, hears the witnesses, and plays the closest and most vital judicial role in the fact-finding process, is in a far better position to determine whether justice requires that the case be reconsidered by a second jury. Appellate interference with the judgment of the trial judge should, if at all, be saved for the most exceptional circumstances. As Justice Brandeis admonished: "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485.

The abandonment of the traditional deference accorded to trial judges' decisions on new trial motions presents an issue of importance to the administration of justice in the federal system. As this Court recently noted, "[the grant of a motion for a new trial] is not an uncommon feature of any trial which goes to verdict." *Allied Chemical*, 449 U.S. at 36. Therefore, the "modern trend" toward an expanded scope of appellate review—typified by the decision below—represents a serious threat to several important principles.[17] Most importantly, the

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[17] In *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930, Judge Mehaffy, who emphasized that a ruling on a motion for a new trial should not be reversed absent a *clear* or *patent* abuse of discretion, recited some of the adverse consequences he perceived would result from the expanded scope of appellate review: "There is no way to predict how much additional work will be created if the rule of this circuit in such matters is abrogated. If we must follow the panel's new rule, it will place this court in the role of trying cases de novo for which we are not and cannot be equipped. Furthermore, this new appellate capacity threatens to erode the factfinding responsibility of the district courts." *Id.* at 190 (Mehaffy, J., dissenting from the denial of rehearing en banc).

ever-widening scope of appellate review impinges upon the traditional role of the trial judge to exercise his discretion to grant a motion for a new trial. Moreover, increased appellate scrutiny removes decision-making authority from the tribunal uniquely situated to exercise this limited restraint on the jury. Finally, because the expanded scope of appellate review threatens an essential attribute of the right to trial by jury, the issue is of constitutional dimensions. This Court's attention and review are clearly warranted.

C. This Court should clarify the appropriate and constitutional standard of appellate review of new trial orders.

Although the "modern trend" pushes toward a more expansive appellate review of new trial orders, the courts of appeals have never defined, with any degree of precision, the appellate role in exercising this "closer degree of scrutiny and supervision." *Lind*, 278 F.2d at 90.[18] Indeed, the standard of review, when it is set forth, is formulated in a variety of ways. *Compare Coffran*, 683 F.2d at 6; App. A at 2a ("abuse of discretion") *with Harris v. Quinones*, 507 F.2d 533, 535 (10th Cir. 1974) ("gross abuse of discretion"). And, the formulations are not wholly verbal; they seem to indicate a court of appeals' willingness to overturn the judgment of the trial judge, in certain instances as an exercise of the court of appeals' independent judgment.

Perhaps most importantly, some courts of appeals seem to have confused the standard for reviewing a ruling on a motion for a new trial with the standard for reviewing a ruling on a motion for j.n.o.v.[19] For example, in *Lind*, the majority, in

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[18] In *Lind*, the dissenters stated: "the only function of a reviewing court, once the trial court has ordered a new trial, is to see whether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict. The majority do not challenge this view, though they do not state explicitly what their understanding of our role is." *Lind*, 278 F.2d at 91 (Hastie and Kalodner, JJ., dissenting).

[19] *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 (1973) (noting recurrent tendency of courts to confuse the standard for a new trial with that for a directed verdict or j.n.o.v.).

reversing the grant of a new trial motion, rebuked the trial judge for considering the credibility of the witnesses. But, as one commentator has noted, "to deny the trial judge the right to consider the credibility of witnesses in passing on motions for new trial is to confuse the standard to be applied by him when considering motions for directed verdict or judgment n.o.v. with the standard associated with motions for new trial." 1961 Duke L. J. 308, 314.[20] In the instant case, some of this confusion appears evident. The court made reference to the evidence being in conflict, *Coffran*, 683 F.2d at 7; App. A at 3a, and placed a great deal of emphasis on the district judge's rejection of what the court of appeals considered to be "credible expert testimony." 683 F.2d at 11; App. A at 11a.

The apparent confusion about the appropriate standard seems to be a product of the "modern trend" toward a more expansive scope of appellate review. Although the trial judge is not to act as a "13th juror," *Coffran*, 683 F.2d at 6; App. A at 2a, he is permitted to weigh the evidence, and a motion for a new trial can be granted "even though there may be substantial evidence which would prevent the direction of a verdict." *Aetna Casualty*, 122 F.2d at 352-53. The confusion which exists can only serve to undermine an essential function of the trial judge under the Seventh Amendment, i.e., his duty to exercise his discretion to grant a new trial motion when—in the exercise of his professional and judicial judgment—he believes that justice requires that a case be reconsidered by a second jury.

This Court's consideration is necessary in order to clarify the confusion which exists in the lower courts as to the appropriate standard of appellate review of new trial orders. Without this Court's attention, the role of the district judge—in acting as an "historic safeguard" of the right to trial by jury—will not be preserved.

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[20] Some courts of appeals, in reviewing rulings on motions for new trial, have relied on cases which involved review of decisions on motions for j.n.o.v. *Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978); *see Fireman's Fund*, 466 F.2d at 186. In *Fireman's Fund*, the dissent called attention to the panel's error in relying on j.n.o.v. cases in formulating standards for appellate review of new trial orders. *Fireman's Fund*, 466 F.2d at 189 (Mehaffy, J., dissenting from denial of rehearing en banc).

CONCLUSION

This Court's review of the decision below is necessary to prevent the undue expansion of appellate review of new trial orders and to clarify the appropriate standard of review.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 1982

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 80-1090

MARION V. COFFRAN, *et al.*,
Plaintiffs, Appellees,

v.

HITCHCOCK CLINIC, INC.,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[HON. MARTIN F. LOUGHLIN, *U.S. District Judge*]

Before
ALDRICH and CAMPBELL, *Circuit Judges,*
and TORRUELLA, * *District Judge.*

Michael P. Lehman, with whom *Sulloway, Hollis & Soden* was on brief, for appellant.

David L. Nixon, with whom *Frank E. Kenison,* and *Brown and Nixon Professional Association* were on brief, for appellees.

June 29, 1982

CAMPBELL, *Circuit Judge.* Marion Coffran has permanent injuries caused by hepatitis, which was first diagnosed on her admission to the Mary Hitchcock Memorial Hospital on June 18, 1970. Mrs. Coffran had two hernia operations at the Hospital in 1970, on April 15 and June 5. These were performed by doctors who were members of the Hitchcock Clinic, Inc. In 1975 Mrs. Coffran, with her husband as co-plaintiff, commenced this diversity action in the United States

* Of the District of Puerto Rico, sitting by designation.

District Court for the District of New Hampshire against the Clinic and the Hospital, contending that her hepatitis was caused by the anesthetic "halothane," which was used for both the April and June operations. She asserted that these administrations of halothane were inconsistent with reasonable medical care. An 11-day jury trial was held, which resulted in verdicts for both defendants. The district court, however, granted plaintiffs' motion for a new trial in respect to the defendant Clinic, appellant herein. The court denied plaintiffs' motion for judgment n.o.v., and therefore its decision to grant the new trial was interlocutory and unappealable at the time. A second jury trial was held, before another judge, resulting in verdicts and sizeable judgments for the plaintiffs. On appeal from those judgments, defendant focuses exclusively on the issue of whether the judge who presided over the first trial had abused his discretion in ordering the new trial.

The district court granted the new trial on the ground that the verdict in favor of the Clinic was against the weight of the evidence. This court has described the proper standards in that situation, both for the trial judge's decision and for our own review, in *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 886-87 (1st Cir. 1978). We said there that the judge has a duty to set aside the verdict and grant a new trial if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice, *quoting Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941). Only if the trial judge commits an abuse of discretion in granting or denying a motion of this character will an appellate court reverse his decision. We went on to observe in *Borras*, however, that a "trial judge should not act merely as a '13th juror' and set a verdict aside simply because he would have reached a different result had he been the trier of fact." 586 F.2d at 887. Rather the judge's duty is to exercise a more limited discretion. He should not interfere with the verdict " 'unless it is quite clear that the jury has reached a seriously erroneous result.' " *Id.*, at 887, *quoting* 6A Moore's Federal Practice ¶ 59.08[5], at 59-160. We observed that the modern trend when reviewing the granting of new trials on the ground that the verdict is contrary

to the great weight of the evidence is away from earlier decisions that the trial judge's discretion is virtually unlimited. Thus, the trial judge's discretion, although great, must be exercised with due regard to the rights of both parties to have questions which are fairly open resolved finally by the jury at a single trial. *See Borras,* 586 F.2d at 887, *quoting Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir.), *cert. denied,* 364 U.S. 835 (1960).[1] Applying these standards after a careful review of the record, we are constrained to conclude that the district court erred in granting plaintiffs' motion for a new trial, and that the jury's verdict in favor of the defendant Clinic must be reinstated. It is true that the court below expressly found that "the jury reached a seriously erroneous result—a result which was contrary to the clear weight of the evidence and which, if allowed to stand, would constitute a patent and grave miscarriage of justice." But in our opinion the record does not support that conclusion. Rather, while it was established that Mrs. Coffran's care was deficient in certain respects, the medical evidence was conflicting as to whether the hepatitis she contracted was causally related to those deficiencies. On the evidence presented, we do not see how a defendant's verdict could be considered as contrary to the clear weight of the evidence. Rather it reflected a jury's resolution of what was factually a very close and difficult case.

A brief review of the facts will be necessary before analyzing the district court's decision and reasoning in more detail. Mrs. Coffran was admitted to the Hospital for her hernia problem on April 14, 1970. She was operated on the next day, at which time she received halothane, an anesthetic which defendant's expert testified is used in one-third of all operations, and is considered in most instances particularly safe and

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[1] The dissenters in *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79, 91 (3d Cir.), *cert. denied,* 364 U.S. 835 (1960), argued that the district court's ordering of a new trial on the ground that the verdict was against the weight of the evidence should be upheld if the appellate tribunal finds "any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict." This court sided with the *Lind* majority in *Borras,* although we emphasize that the district court's discretion to grant a new trial remains large, and will not be disturbed if reasonably based.

effective. This was the second time in her life that halothane had been administered to her, the first being in 1964. The April hernia repair was not completely satisfactory, and Mrs. Coffran was re-admitted on June 4, 1970 for further surgery. During the operation on June 5, she again received halothane. After returning home, she became jaundiced about June 15. She returned to the Hospital on June 18, and was diagnosed as suffering from hepatitis. Her condition worsened, resulting in some brain damage due to hepatic encephalopathy. Her treating physician, Dr. McCleery, diagnosed Mrs. Coffran as suffering from hepatitis caused by the June exposure to halothane.

Although it was known in 1970 that a tiny number of patients who received halothane later contracted hepatitis, there was some question among experts within the medical profession whether the hepatitis was actually caused by the halothane. Those who believed that halothane caused hepatitis—and the evidence suggests that the believers outnumbered the disbelievers—posited a "sensitization" theory, as follows. A patient who is susceptible to halothane hepatitis is sensitized to halothane by exposure; there is no hepatitis at this time. After a subsequent exposure to halothane, however, the sensitized patient does contract hepatitis. This sensitization process is to be distinguished from direct toxic disease reactions, whereby liver damage is caused by the first exposure to a drug, and by a very different mechanism. Those doctors who did not accept the validity of the halothane sensitization thesis believed that halothane had been mistakenly incriminated in cases of viral hepatitis which became clinically evident after operations using halothane. Regardless of whether the halothane actually caused the hepatitis, or was merely innocently associated with it, the incidence of hepatitis following use of halothane was very rare: one study of fatal hepatic occurrences reported only nine otherwise unexplained fatal hepatic occurrences out of 250,000 administrations of halothane. Two points are vital. First, there was not at the time of trial, or in 1970, a preoperative test which could definitively identify those patients who would be susceptible to halothane sensitization, or who already were sensitized.

Second, once hepatitis was contracted, there was no test which could distinguish between "halothane hepatitis" (if indeed it existed) and other forms, such as viral hepatitis.

Plaintiffs' theory was that Mrs. Coffran's hepatitis was caused by her exposure to halothane in June, following sensitization by the April 1970 or 1964 administrations of halothane. They argued that while there was no single test to predict halothane sensitivity, Mrs. Coffran exhibited certain "markers" of sensitivity that should in the exercise of due care have been recognized, resulting in the choice of a different anesthetic (or in at least the administration of additional tests that might have further suggested sensitivity). Plaintiffs also asserted that the Clinic negligently omitted certain pre-operative tests in June which, had they been done, would have shown halothane sensitivity. The Clinic contended that Mrs. Coffran's hepatitis was not caused by halothane; that even if it was, its doctors were not negligent in failing to recognize her alleged markers of sensitivity; and that even if it was negligent in failing to perform the pre-operative tests, this failure was not a cause of Mrs. Coffran's hepatitis, since the tests would not have shown anything to contraindicate the use of halothane.

Plaintiffs presented four expert witnesses at trial: Dr. Bricker, a general practitioner and expert in "legal medicine"; Dr. McCleery, a gastroenterologist[2] and member of the Clinic, who was Mrs. Coffran's primary treating physician since the onset of her hepatitis; Dr. Sy,[3] the anesthesiologist who prescribed halothane for Mrs. Coffran in April and June; and Dr. Barnett Greene, an anesthesiologist who was widely published but had written nothing specifically about halothane. Defendant presented one expert, Dr. Nicholas Greene, the chairman of the Yale Medical School's Department of Anesthesiology, whose publications included work on halothane.

Plaintiffs' evidence suggested a number of different negligent acts or omissions by the Clinic with respect to the April operation. These, however, could not have directly caused Mrs.

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[2] Gastroenterology is a sub-speciality which includes the study of liver illnesses.

[3] Dr. Sy's testimony was presented via transcribed and videotaped depositions.

Coffran's injury since it was not plaintiffs' theory that Mrs. Coffran contracted halothane hepatitis at that time.[4] Plaintiffs also presented evidence relating to the Clinic's alleged failure to notice purported markers of Mrs. Coffran's sensitivity. However, there was a great deal of evidence—including testimony by Dr. McCleery, plaintiffs' own witness—from which a jury might reasonably have determined that the purported "markers" (such as "unexplained post-operative fever") were not in fact such and that there was no negligence in prescribing halothane in June in light of what the Clinic physicians knew of Mrs. Coffran's condition and medical history. The district court, therefore, quite property did not rely on any activities related to the April operation, or the evidence regarding markers of sensitivity, in stating its reasons for granting a new trial.

Rather, the district court focused on two things: the Clinic's failure to perform an "eosinophil count" before the June operation, and the possibility that Mrs. Coffran had contracted viral hepatitis before the June operation which was aggravated by readministration of halothane. We discuss the "pre-existing viral hepatitis" theory first.

The district court's reference to this theory is puzzling for several reasons. First, the theory was never presented to the jury. The jury was instructed without objection by plaintiffs that the plaintiffs needed to prove that halothane was "the probable cause of Mrs. Coffran's hepatitis." At a conference in chambers, plaintiffs' counsel explicitly agreed that if the jury did not find halothane caused her hepatitis, the verdict would be for the defendant. The jury was never instructed that it could consider whether the halothane aggravated a preexisting hepatic condition. Further, the court believed that an "Australian antigen test" had ruled out viral hepatitis. Given this belief, it is difficult to understand how the court could have also thought it possible that Mrs. Coffran did in fact suffer from viral hepatitis. Finally, the court's interpretation of the Australian antigen test was mistaken. The evidence was uncontradicted

[4] Even if Mrs. Coffran was sensitized in April, that alone caused her no injury absent a subsequent exposure to halothane.

that Mrs. Coffran's negative result did not rule out viral hepatitis. Only a positive result would have been conclusive; nothing could be inferred either way from a negative result. In any case, the belief that Mrs. Coffran might have contracted hepatitis before June could not have warranted a new trial given the theory on which the case was presented and tried.

We are not certain of the extent to which the court's erroneous reliance on the above theory contributed to its conclusion to grant a new trial. In any case, the court's primary reliance was clearly on the Clinic's failure to perform an eosinophil test in June. This is a test which determines the percentage of eosinophils—a type of white cell—in the blood. Plaintiffs argued that if it had been performed, it would have warned of Mrs. Coffran's sensitivity to halothane, and thus would have led to more tests and the choice of a different anesthetic in June. Three distinct questions are presented in connection with this theory, two related to causation and one to the standard of care. First, does Mrs. Coffran suffer from halothane hepatitis? If not, then the test is irrelevant since the administration of halothane would not be a cause of her hepatitis. Second, did the omission of this test constitute a failure to provide reasonable medical care? Third, if the test had been done, would it have shown halothane sensitivity? If not, again its omission would not be a cause of Mrs. Coffran's hepatitis, since even if it had been performed, her sensitivity would have gone undetected and she would have been given the halothane.

The evidence was conflicting as to whether Mrs. Coffran's hepatitis was caused by halothane. All of plaintiffs' experts testified that it was. This included both Dr. McCleery and Dr. Sy, both of whom were members of the Clinic during the time they treated Mrs. Coffran. Mrs. Coffran's medical records showed that all fourteen of the doctors (many just interns and residents) who saw her over the years following her June 18 admission wrote down that her problem was halothane hepatitis. While the district court thought this was "significant," the testimony showed that most of these doctors simply recopied the original diagnosis without any thorough independent evaluation of their own.

Dr. Nicholas Greene testified that in his opinion Mrs. Coffran was suffering not from halothane hepatitis, but from viral hepatitis which became evident after the operation.[5] He gave two reasons for this belief. First, the course of Mrs. Coffran's illness was not typical of those cases usually ascribed to halothane hepatitis. Second, Dr. Greene was not convinced that halothane ever actually caused hepatitis. Rather, he thought the sensitization theory the product of a statistical "mirage" caused by the coincidence of increasing use of halothane and increasing, but unrelated, instances of viral hepatitis. Dr. Greene was not alone in this belief. Plaintiffs' own experts testified to an ongoing debate within the profession over whether halothane does cause hepatitis.

Given Dr. Nicholas Greene's exceptional credentials and expertise on the subject of halothane, and his reasoned explanation of his conclusions, it is perhaps doubtful whether a jury could properly be held to have seriously erred in crediting his testimony over that of the other witnesses. As Chairman of the Yale Medical School's Anesthesiology Department, and the witness who had done the most research on the precise issue of the causal connection between halothane and hepatitis, Dr. Greene's views cannot so easily be written off as the views of the more questionable expert in *Borras*, 586 F.2d at 887. On the other hand, the district judge was entitled to note that the Clinic's own doctors, Dr. McCleery and Dr. Sy, diagnosed the case as one of halothane-induced hepatitis. Dr. Sy was the very anesthesiologist here charged with negligence. Additionally, as the court noted, the manufacturer of halothane gave written warnings of the possibility of hepatitis after use of halothane at least as early as 1968. Given these, and a number of other factors which we need not take the time to relate, we shall for present purposes accept, as not exceeding the trial court's discretion, its conclusion that it would be against the clear weight of the evidence to find that Mrs. Coffran's hepatitis was not caused by halothane.

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[5] Dr. Greene did not testify that the halothane aggravated this hepatitis in any way. He did, however, testify that the hernia operation and administration of any anesthetic would have been contraindicated by the known presence of hepatitis.

Turning next to whether the failure to give the eosinophil test constituted negligence, the evidence was very strong that it did. Even Dr. Nicholas Greene admitted that it was negligent not to give Mrs. Coffran a blood test in June; the only question is whether that test should have included an eosinophil count. Dr. Greene testified that only certain hemoglobin tests were needed, but plaintiffs' experts, including Dr. McCleery and Dr. Sy, testified that a "complete blood count," including an eosinophil test, was required. While the content of a complete blood count evidently varies from institution to institution, the testimony of Drs. McCleery and Sy indicates that at least at Hitchcock, it included the eosinophil test. Therefore, when they said that it was negligent not to give a complete blood count, they were including the eosinophil test. We thus believe that the district court was on firm ground in concluding that the failure to give Mrs. Coffran this test was so plainly negligent that a contrary jury finding would be against the clear weight of the evidence.

The most difficult problem, and the one which causes us to disagree with the district court, is presented by the last issue: whether the clear weight of the evidence was that had the test been done, it would have shown an abnormal reading which, in turn, would have triggered an examination leading to the use of another anesthetic. Plaintiffs' theory was (1) that an abnormally high eosinophil reading may reflect sensitivity to a variety of different drugs, as well as other conditions; (2) that Mrs. Coffran was sensitized to halothane; (3) that therefore if the test had been done, it would have shown an abnormal reading; and (4) that this abnormal reading, while not in itself specifically pointing to halothane as the cause, would have been reason to postpone the operation, make further tests, and ultimately decide on a different anesthetic. The first proposition was undisputed, and, while the fourth is more speculative, we shall accept it for present purposes. As to the second, Dr. Greene testified to an opinion that Mrs. Coffran did not have halothane hepatitis, and that, indeed, halothane would not produce sensitization at all. However, as indicated above, we shall assume, if with some doubts, that the judge was entitled to discount this view as contrary to the great weight of the evidence. Thus we shall proceed on the supposition that the

weight of the evidence demonstrated that her hepatitis was caused by the halothane, and that she was sensitized to it prior to June.

Our difficulty, then, focuses on the third step in the argument: assuming she was sensitized, did the clear weight of the evidence demonstrate that, in her case, the test would have been abnormal? If not, the causal link is broken; it is fundamental that negligence without causation is not actionable. *See, e.g.,* Restatement (Second) of Torts § 432. The burden of proof is on the plaintiff to establish causation by a preponderance of the evidence. *Id.*, § 433B & comment a; *Jutras v. J. Scanlon Co.*, 106 N.H. 130, 133, 206 A.2d 615 (1965). The district judge, while dealing with the other points, made no mention of this one, suggesting that after concluding, correctly, that it was poor medical practice to omit the test, he failed to consider the degree to which the evidence demonstrated that, had the test been given, it would have been abnormal and thus served as a "red flag." We do not think that plaintiffs carried their burden so convincingly on this point as to justify the grant of a new trial.

Plaintiffs' expert anesthesiologist, Dr. Barnett Greene, testified that 50 percent of those who are sensitized to halothane exhibit "eosinophilia," or an abnormally high eosinophil count. He also testified that a high eosinophil count Mrs. Coffran had in July 1970 was evidence that she was among the 50 percent who do show eosinophilia as a marker of halothane sensitization. Defendant's expert, Dr. Nicholas Greene, disputed this evidence, however. Assuming sensitization ever occurs, he testified that only 33 percent of those who are sensitized exhibit eosinophilia. Furthermore, he testified repeatedly that the failure to do blood tests in June was not causally related to Mrs. Coffran's hepatitis because their results would not have affected the choice of anesthetic.

Given Dr. Nicholas Greene's testimony, we do not think a new trial could properly have been granted on the ground that the jury was seriously mistaken if it disbelieved Dr. Barnett Greene's testimony implying that Mrs. Coffran would have shown eosinophilia had the test been done in June. In the absence of special circumstances not present here, such as a vast

disparity in qualifications or the presence of strong impeaching factors, we do not think it can be said that a verdict merely crediting one witness over one other witness is against the clear weight of the evidence. To be sure, the evidence did show that there was a 33-50 percent chance her eosinophil count would have been abnormal. In cases such as this, when the defendant omitted a safety precaution which would have had at least a substantial likelihood of saving the plaintiff from harm, courts have been generous in permitting the evidence to go to the jury over a defendant's motion for a directed verdict, even "though it is often a pretty speculative matter whether the precaution would in fact have saved the victim." 2 F. Harper & F. James, *The Law of Torts* § 20.2, at 1113(1956); *see, e.g., Zinnel* v. *United States Shipping Board Emergency Fleet Corp.*, 10 F.2d 47, 49(2d Cir. 1925)(L. Hand, J.); *Kallenberg* v. *Beth Israel Hospital*, 45 A.D.2d 177, 357 N.Y.S.2d 508 (1974), *aff'd*, 37 N.Y.2d 719, 374 N.Y.S.2d 615, 337 N.E.2d 128 (1975); *Hamil* v. *Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978). This standard for overcoming a motion for a directed verdict does not mean, however, that the plaintiff is relieved of his burden of proving causation: the jury must still find that defendant's negligence caused plaintiff's injury. *See Kimball* v. *Scors*, 59 A.D.2d 984, 399 N.Y.S.2d 350 (1977), *explaining Kallenberg, supra; Hamil, supra*, 392 A.2d at 1288 n.9. New Hampshire has also emphasized that causation is a question for the jury. *See, e.g., Tullgren* v. *Amoskeag Manufacturing Co.*, 82 N.H. 268, 274 133 A. 4 (1926). Under this standard, we must conclude that the jury could not be characterized as seriously mistaken if it chose to believe that the failure to perform the eosinophil test in June was not a cause of Mrs. Coffran's injuries.

Given the credible expert testimony that the Clinic's failure to perform an eosinophil test in June was not causally related to Mrs. Coffran's hepatitis, we must conclude that the district court abused its discretion in granting a new trial on the ground that the verdict in favor of the Clinic was against the weight of the evidence. We find no basis in the record on which it could logically be concluded that the clear weight of the evidence

supported an inference that had an eosinophil test been given, Mrs. Coffran's alleged susceptibility to halothane hepatitis would have been revealed.

We are left with no alternative but to vacate the order granting a new trial and the judgments entered in the second trial. The case is remanded with directions that judgment be entered on the verdict in favor of the defendant Hitchcock Clinic, Inc.

So ordered.

United States District Court
FOR THE DISTRICT OF NEW HAMPSHIRE

CIVIL ACTION FILE NO. 75-293-L

MARION V. COFFRAN and
CHARLES W. COFFRAN

vs.

HITCHCOCK CLINIC, INC.

JUDGMENT RE MARION V. COFFRAN

This action came on for trial before the Court and a jury, Honorable Martin F. Loughlin, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Plaintiff Marion V. Coffran.

It is Ordered and Adjudged that damages are assessed in the sum of Two Hundred Eight-Four Thousand, Five Hundred Dollars, ($284,500.00).

Dated at Concord, New Hampshire, this fourth day of December, 1979.

/s/ WILLIAM H. BARRY, JR.

Clerk of Court

United States District Court

FOR THE DISTRICT OF NEW HAMPSHIRE

CIVIL ACTION FILE NO. 75-293-L

MARION V. COFFRAN and
CHARLES W. COFFRAN
vs.
HITCHCOCK CLINIC, INC.

JUDGMENT RE CHARLES W. COFFRAN

This action came on for trial before the Court and a jury, Honorable Martin F. Loughlin, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Plaintiff Charles W. Coffran.

It is Ordered and Adjudged that damages are assessed in the sum of Two Hundred Twenty-Eight Thousand, Five Hundred Dollars, ($228,500.00).

Dated at Concord, New Hampshire this fourth day of December, 1979.

/s/ WILLIAM H. BARRY, JR.

Clerk of Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 75-293

MARION V. COFFRAN and
CHARLES W. COFFRAN,
Plaintiffs

v.

MARY HITCHCOCK MEMORIAL HOSPITAL
and HITCHCOCK CLINIC, INC.,
Defendants.

Order on Plaintiffs' Motion for Judgment Notwithstanding the Verdicts and on Plaintiffs' Motion in the Alternative for a New Trial

Upon consideration of the entire record in this case, and upon consideration of the memoranda and oral argument of the parties in support of and in opposition to the above motions, it is ordered as follows:

A. Plaintiffs' motion to set aside the jury verdicts of December 8, 1978 and the judgments entered thereon and to enter judgments for plaintiffs notwithstanding these verdicts is denied.

B. Plaintiffs' motion in the alternative to set aside the jury verdicts of December 8, 1978 and the judgments entered thereon and to grant them a new trial is hereby:

1. Denied as to the defendant Mary Hitchcock Memorial Hospital on the ground that such verdict was not contrary to the clear weight of the evidence.

2. Allowed as to the defendant Hitchcock Clinic, Inc. and the jury verdict in favor of this defendant is hereby set aside and a new trial is hereby ordered on all issues on the ground, as more fully set forth in the accompanying memorandum, that such verdict was seriously erroneous, contrary to the clear weight of the evidence and would result in a grave miscarriage of justice.

/s/HERBERT N. MALETZ

Herbert N. Maletz
Judge, United States Customs Court
sitting by designation pursuant to 28
USC 293(b)

February 13, 1979

United States District Court
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 75-293

MARION V. COFFRAN and
CHARLES W. COFFRAN,
Plaintiffs

v.

MARY HITCHCOCK MEMORIAL HOSPITAL
and HITCHCOCK CLINIC, INC.,
Defendants.

Memorandum Accompanying Order Granting Plaintiffs a New Trial as to the Defendant, Hitchcock Clinic, Inc.

Upon review of the over-all record in this case—the trial of which was protracted and complex—the court is convinced that the jury verdict in favor of the defendant, Hitchcock Clinic, was seriously erroneous, contrary to the clear weight of the evidence, and would result in a grave miscarriage of justice. In this circumstance, the court has the duty to set aside the jury verdict and order a new trial on all issues. See, e.g., *Rios* v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990-991 (1st Cir. 1978); *Aetna Casualty and Surety Company* v. *Yeatts*, 122 F.2d 350, 352 (4th Cir. 1943); 6A Moore's, *Federal Practice* (2d ed.) ¶ 59.08[5], pp. 59-156-59-161; Wright & Miller, *Federal Practice and Procedure; Civil* § 2806, pp. 44-50.

More specifically, there is no dispute that the plaintiff, Mrs. Coffran, is today afflicted with permanent liver damage resulting from hepatitis. Further, the clear weight of the evidence showed either that her hepatitis was caused by the halothane anesthesia which was re-administered to her on June 5, 1970 (after a prior administration on April 15, 1970) or that the hepatitis preexisted the re-administration of halothane on June

5, 1970 when it was aggravated by such administration.[1] In either situation, the overwhelming weight of the evidence established that Dr. Walter P. Sy, the anesthesiologist and then employee of the defendant Hitchcock Clinic, who had planned the halothane administration for Mrs. Coffran on April 15, 1970 and planned and re-administered the halothane to her on June 5, 1970, was negligent, if not grossly negligent, in re-administering halothane to Mrs. Coffran on June 5, 1970 without giving her standard and routine pre-operative blood and laboratory tests (save for an urinalysis) prior to such re-administration of halothane.

The clear weight of the evidence also established that in the exercise of reasonable medical care such standard tests should have included at the least a complete blood count of Mrs. Coffran before halothane was re-administered to her on June 5, 1970 as the anesthesia for her hernia operation—which was classified as a major abdominal surgical operation. The importance of a complete blood count was specifically acknowledged by Dr. Sy himself, who stated in his videotape testimony that:

> Every patient coming for surgery must have what is called a complete blood count, so-called C.B.C., in which the various cells, red cells, white cells, platelet cells are looked at under a microscope, their amount is measured and that is recorded. In addition, an analysis, I mentioned, of urine is also made. Those two things are required by the laws of the hospital for the practice of good surgery in medicine. Now beyond those basic blood tests frequently a couple of other tests are done. They usually have to do with kidney function. And frequently the amount of salt in the blood is measured, but not always. Beyond those any tests done on the blood itself are usually

[1] In this latter connection, the defendant's expert, Dr. Nicholas M. Greene, testified at trial and had earlier reported in writing in a letter to counsel for defendant, Hitchcock Clinic, that in his opinion Mrs. Coffran was in fact suffering from hepatitis at the time of her admission to the hospital on June 4, 1970.

> those that have been indicated by something in the history or the physical exam that would make you prick up your ears and say we'd better check such and such and that list of tests therefore will vary again from patient to patient.

Drs. Barnett Greene, Jack L. McCleery and Glenn W. Bricker not only concurred with the aforesaid by Dr. Sy, but indicated that such pre-operative testing was common, ordinary, reasonable medical practice.

What is more, defendant's expert Dr. Nicholas M. Greene[2] stated in part in a letter-opinion of December 27, 1977 to counsel for defendant Hitchcock Clinic that:

> (1) The patient [Mrs. Coffran] should have had laboratory studies done prior to her operation on June 5 that were not done. *Specifically, she should have had at least a blood count.* That she did not is awkward. * * * [Emphasis added.]
>
> (2) Dr. Sy in his pre-operative note of April 14, 1970, wrote "suggest repeat (of halothane anesthesia) for ing. [inguinal] hernia pending W/U [work-up] to lab." That he went ahead without waiting for "pending" laboratory tests is, again, awkward, but not necessarily disastrous.[3]

Notwithstanding what he had stated in his December 27, 1977 letter as to the necessity for a blood count and other laboratory tests, Dr. Nicholas Greene in his testimony—alone

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[2] Two doctors named Greene testified in the case. The first was Dr. Barnett Greene, a plaintiffs' medical expert. The second was Dr. Nicholas M. Greene, a defendants' medical expert.

[3] Dr. Sy's failure to have laboratory tests before the administrations of halothane was not necessarily disastrous, according to Dr. Greene's letter of December 27, 1977, because, among other things, Dr. Greene was not "convinced" that the hepatitis Mrs. Coffran experienced was related to or caused by halothane. But for reasons set forth in a later part of this memorandum, the clear weight of the evidence established that Mrs. Coffran's hepatitis was caused or aggravated by the halothane administered to her on June 5, 1970.

among the medical experts—discounted the necessity for pre-operative blood work and other laboratory testing with reference to Mrs. Coffran and stated that only a hemoglobin and hematocrit should have been performed upon her. A hemoglobin test, the record shows, provides an index of how much oxygen can be carried in the blood, while a hematocrit determines the volume occupied by red cells in the blood and thus measures the oxygen carrying potential of the blood. Dr. Nicholas Greene then went on to testify that an anesthesiologist looks at these hemoglobin and hematocrit pre-operative blood tests only to find out whether or not the patient's *red blood* count is sufficient to transport necessary oxygen during the course of the operation. The results of *this* blood work, he added, do not influence one way or another the choice of an anesthesia.

But this testimony overlooks entirely the significance of a *complete blood count* in which, among other things, the *white* cells are examined under a microscope. On this aspect, the record shows that there are various kinds of white cells, one kind being the eosinophils—which are white cells that have many granules thereon. Further, it is undisputed that an eosinophil count is a part of every complete blood count. It is also undisputed that an eosinophil count of over 7% demonstrates that the body is allergic or hypersensitive to some foreign substance or drug and that in such a situation additional tests are necessary—particularly before major surgery is to be performed—to determine the cause. It is quite true that all the witnesses agreed that there is no absolute test to determine a patient's sensitivity to halothane. However, the clear weight of the evidence established that an eosinophil count of over 7% serves as a red flag or warning which, in the exercise of reasonable medical care, necessitates further tests to determine the cause of the eosinophil abnormality, including whether or not halothane—which is a toxic drug—should be administered. Indeed, the importance of laboratory tests—including an eosinophil count—to determine whether or not halothane should be used was recognized by Dr. Sy himself when he suggested in his pre-operative note of April 14, 1970 (which is quoted above) that *halothane* should be administered to Mrs. Coffran *pending* laboratory tests. This is clear recognition by

Dr. Sy that there is a relationship between laboratory tests and the decision as to whether or not to use halothane. Moreover, as Dr. Nicholas Greene made clear in his letter of December 27, 1977, the decision as to whether or not to use halothane should have awaited the results of the laboratory tests. Thus, Dr. Nicholas Greene also recognized that there is a relationship between laboratory tests and the decision as to whether or not to administer halothane.

It is also important to observe, as previously mentioned, that Dr. Nicholas Green was of the opinion that Mrs. Coffran was suffering from hepatitis at the time of her admission to the hospital on June 4, 1970. And suffering from that condition, it is apparent from the record that Mrs. Coffran should not have been administered any anesthesia.

As to whether the June 5, 1970 administration of halothane to Mrs. Coffran caused her hepatitis or aggravated a pre-existing hepatitis condition, the court finds it significant that every single one of the 14 medical doctors and specialists who diagnosed and/or treated Mrs. Coffran following her re-admission to the Mary Hitchcock Memorial Hospital on June 18, 1970 (13 days after the June 5, 1970 administration of halothane to her) at which time she unquestionably had hepatitis, recorded in her contemporaneous medical chart and/or admitted under oath at trial that on June 18, 1970 Mrs. Coffran had "halothane-induced [caused] hepatitis." These doctors and specialists included Dr. Sy, the board-certified anesthesiologist and then employee of the defendant Hitchcock Clinic, who had planned the halothane anesthesia administration for Mrs. Coffran on April 15, 1970 and who planned and administered the halothane anesthesia to her on June 5, 1970; Dr. Mosenthal, the board-certified specialist in surgery and employee of the defendant Hitchcock Clinic, who operated on Mrs. Coffran for hernias on both April 15, 1970 and June 5, 1970; Dr. McCleery, the board-certified gastroenterologist and employee of the defendant Hitchcock Clinic, who began caring for Mrs. Coffran on June 18, 1970 and has continuously been her principal attending physician and specialist during the 8½ succeeding years to the present time; and Dr. Burke, the board-certified anesthesiologist and employee of the defendant Hitch-

cock Clinic, who administered halothane to Mrs. Coffran on April 15, 1970, who sat at counsel table representing Hitchcock Clinic throughout the trial but was not called to the stand by either defendant.

Dr. Nicholas Greene alone disagreed. He expressed the opinion that Mrs. Coffran's hepatitis was not probably caused by halothane on the ground that when she was discharged on June 11, 1970 she was well and had no nausea, anorexia, fever or jaundice. The jaundice, he testified, did not appear until June 15, which he stated was totally uncharacteristic of "halothane hepatitis." Dr. Greene further testified that the clinic note of June 18, 1970 stated that Mrs. Coffran indicated she had nausea feeling two weeks prior to the June 4 admission. From this, Dr. Greene was of the opinion that Mrs. Coffran "had * * * infectious hepatitis on June 5 and that it went on to jaundice on about June 15."

The court is quite mindful that in determining whether or not a jury verdict is contrary to the clear weight of the evidence, the test is not which side brings the greater number of witnesses or presents the greater quantity of evidence. In fact, the testimony of a single witness is sufficient to justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary. Nor is the test the credibility of the witnesses for credibility is within the particular province of the jury, not the court. See, e.g., *Rios* v. *Empresas Lineas Maritimas Argentinas, supra,* 575 F.2d at 990. The test, rather is an evaluation of the quality of the evidence presented.

Measured by that standard, the probative weight of Dr. Nicholas Greene's testimony is lessened by a number of considerations. For example, Dr. Greene's opinion was based solely on his review of Mrs. Coffran's medical records *prior* to her June 18, 1970 re-admission. In this respect, he acknowledged that a specialist attending Mrs. Coffran was in a better position to diagnose her condition than a specialist who merely examines the medical record. And in that connection he testified that he was not aware that Dr. McCleery—the gastroenterologist who began caring for Mrs. Coffran on June 18, 1970 and has continuously been her principal attending physician and specialist during the 8½ succeeding years to the

present time—had diagnosed Mrs. Coffran's condition as halothane-induced hepatitis. Further, Dr. Greene testified that Dr. Sy supported him in his opinion that Mrs. Coffran's condition was not caused by halothane. However, Dr. Sy testified that he had no doubt that Mrs. Coffran was suffering from halothane-induced hepatitis. Also, Dr. Greene was of the opinion that Mrs. Coffran was suffering from viral hepatitis and not halothane-induced hepatitis. He did not examine Mrs. Coffran's admission record of June 18, 1970 or her subsequent medical record on the ground that he did not think they were relevant. Hence, he was unaware that in May 1978 Mrs. Coffran was given Australian antigen tests which turned out negative and thus ruled out viral hepatitis.[4]

As an additional reason for his opinion that Mrs. Coffran's hepatitis was not probably caused by halothane, Dr. Green took the position that the disease entity "halothane hepatitis" has yet to be established by the "scientific method" and so cannot be considered to have been "medically established." But the standard to be applied is whether it is more probable than not that Mrs. Coffran's hepatitis was caused by the administration of halothane. And as to this, it is relevant to observe that Dr. Nicholas Greene conceded in a deposition that halothane may cause liver damage. Moreover, in an article in the New England Journal of Medicine on September 9, 1973, Dr. Nicholas Greene wrote that "The halogenated anesthetics that characterize today's practice of anesthesia have in common the fact that they may be associated with severe and potentially fatal, if rare, post-operative hepatitic failures." Further, a pamphlet issued in December 1968 by the Ayerst Laboratories, the manufacturer of halothane, states that "Fatal, massive hepatitic necrosis or cholastic jaundice may occur following surgery performed under anesthesia in which halothane in its usually safe concentration is a major component."

In sum, upon review of the overall record, the court is compelled to conclude that the jury reached a seriously erroneous result—a result which was contrary to the clear weight

[4] Dr. Nicholas Greene agreed that if an Australian antigen test is negative, viral hepatitis is ruled out.

of the evidence and which, if allowed to stand, would constitute a patent and grave miscarriage of justice. Accordingly, a new trial is ordered on all issues as to the defendant, Hitchcock Clinic, Inc.

/s/ HERBERT N. MALETZ

Herbert N. Maletz
Judge, United States Customs Court
sitting by designation pursuant to 28
USC 293(b)

February 13, 1979

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 80-1090.

MARION V. COFFRAN, *et al.*,
Plaintiffs, Appellees,

v.

HITCHCOCK CLINIC, INC.,
Defendant, Appellant.

JUDGMENT

Entered June 29, 1982

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court granting a new trial and the judgment entered in the second trial are vacated and the cause is remanded with directions to enter judgment on the verdict in favor of the defendant Hitchcock Clinic, Inc.

By the Court:

/s/ DANA H. GALLUP
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1090

MARION V. COFFRAN, *et al.*,
Plaintiffs, Appellees,

v.

HITCHCOCK CLINIC, INC.,
Defendant, Appellant.

Before
ALDRICH AND CAMPBELL, *Circuit Judges,*
AND TORRUELLA,* *District Judge.*

MEMORANDUM AND ORDER

Entered July 26, 1982

Per Curiam. Plaintiffs seek rehearing. They commence by reciting legal standards of which we are well aware and believe the many matters we decided in plaintiffs' favor made our awareness plain. They then reargue matters such as the court's right to reject certain testimony of Dr. Nicholas Greene which, in fact, we have already conceded.

With respect to the "aggravation" theory, plaintiffs have not pointed to any part of the jury instructions where this theory was explicitly presented to the jury. Even if the jury had been instructed to consider this possibility, however, the great weight of the evidence does not demonstrate that defendant was negligent in failing to diagnose the hepatitis before the June 5 operation.

* Of the District of Puerto Rico, sitting by designation.

The cases cited by plaintiffs on the law of causation stand only for the proposition that, in appropriate circumstances (generally involving reliance on common knowledge), a jury may infer causation even in the absence of direct evidence. They do not change the rule that the burden of proof on causation remains with the plaintiff, nor that it is for the jury to make the determination. We agreed that causation could have been found. Plaintiffs, however, do not show that it would be reasonable to conclude that the jury would have been clearly erroneous in finding that causation was not established. Not only did the district court not make any such determination, it did not even reach this crucial issue. One thing should be clear: we are not "set[ting] ... aside the verdict of the second jury," in the sense of our decision being somehow critical of the second verdict. We make no such suggestion that the second jury was not warranted, if the matter had been properly before it, in finding for the plaintiffs. However, this in no way indicates that the first jury committed clear error by not finding for the plaintiffs.

Finally, where plaintiffs sought a new trial on a number of stated grounds, and the court granted the motion in an extensive memorandum, citing one ground only, we need not and will not test its action by speculating as to whether it could have made some other finding. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33 (1980) (per curiam), is not on point. It involved interlocutory review via mandamus of a district court's oral order granting a new trial. Different considerations apply to the review of a district court's written decision on appeal from a final judgment. Setting aside a jury verdict is too serious a matter to assume the court exercised discretion and made findings that it did not even purport to make. In any event, we cannot say that the record reflects such clear evidence of jury confusion as would justify either an affirmance of the grant of a new trial or a remand for clarification from the

district court. Unlike *Barnett* v. *Love*, 294 F.2d 585 (4th Cir. 1961), cited by plaintiffs, here there were no misleading statements made by the trial judge in response to questions from the jury, nor did the jury's verdict itself show evidence of confusion.

The petition for rehearing is denied.

By the Court,

/s/ DANA H. GALLUP

Clerk.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-694

In The
Supreme Court of the United States

OCTOBER TERM, 1982

MARION V. COFFRAN and CHARLES W. COFFRAN,
Petitioners,

v.

HITCHCOCK CLINIC, INC.,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

1. Whether this Court should allow petitioners to dispute in this Court the standard of review used by the court of appeals, when petitioners specifically agreed with that standard in the proceedings below.

2. Whether the standard for review of new trial orders merits the consideration of this Court when the proper standard is already being applied consistently and appropriately in the courts of appeals.

3. Whether a case in which the trial court clearly and unequivocally abused its discretion, under even the strictest formulation of that standard, is the appropriate vehicle for this Court to use in reviewing the standard.

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REASONS FOR DENYING THE WRIT

A. THE ISSUE RAISED BY PETITIONERS WAS NOT IN DISPUTE BELOW.

The settled practice in this Court is not to consider, except in exceptional cases, questions which were not disputed below. *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430 (1940). This rule extends to newly raised Constitutional issues, such as the purported Seventh Amendment issue which petitioners raise for the first time here. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969). Although the proper standard of review was discussed in petitioners' Brief below, it was neither disputed nor argued by petitioners. While this Court is certainly able to review issues which were raised in the court below, it would be extraordinary to allow petitioners to argue here an issue which, though raised, they did not dispute below.

Even a cursory reading of petitioners' Brief to the court of appeals (reproduced herein as Appendix A) demonstrates that petitioners not only failed to dispute the reviewability of the trial court's decision, but agreed that the standard of review used by the first circuit in reviewing new trial orders was proper and, furthermore, cited with approval several of the same cases which they now argue were wrongly decided.

Petitioners stated below that, "The trial court's granting of a motion for new trial must be sustained on appeal unless there has been an abuse of discretion." (App. A at 17a) Petitioners cited for this statement the important first circuit case of *Borras* v. *Sea-Land Service, Inc.,* 586 F.2d 881 (1st Cir. 1978), which held, in direct contradiction of petitioners' current position, that:

> "Where the basis for a new trial is that the verdict is contrary to the great weight of the evidence, the modern trend has been away from earlier decisions that the district court's discretion is virtually unlimited." 586 F.2d at 887.

Not only did petitioners agree that an abuse of discretion review was proper, they cited with approval, and quoted at length from, the very case which they now attack most vigorously, *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960), a case supporting the proposition that a reviewing court should closely scrutinize a trial court's granting of a new trial in derogation of a jury's verdict. (App. A at 18a.)

To allow petitioners now to attack a proposition with which they fully agreed in the court below would not only be contrary to the established practice of this Court, it would seriously interfere with the efficient administration of justice and the morale of the courts of appeals.

B. THE STANDARD FOR APPELLATE REVIEW OF NEW TRIAL ORDERS IS NOT ONE WHICH NEEDS CONSIDERATION BY THIS COURT.

The issue raised by petitioners is not one which merits the attention of this Court. Contrary to petitioners' assertions, this Court has not for all practical purposes forbidden appellate review of new trial decisions. Furthermore, the courts of appeals are in almost unanimous agreement that new trial orders may be reviewed using an abuse of discretion standard, and they have been extremely reluctant to reverse trial courts using this standard, even when it is applied somewhat more strictly in the review of cases in which the trial court has ordered a new trial on evidentiary grounds.

1. *This Court and the Federal Rules of Civil Procedure have specifically sanctioned appellate review of new trial orders.*

Contrary to petitioners' assertions, this Court has specifically sanctioned appellate review of new trial orders. In *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33 (1980), the very case relied heavily upon by petitioners, the Court stated, "A litigant is free to seek review of the propriety of such an order

on direct appeal after a final judgment has been entered." 449 U.S. at 36. While this power of a court of appeals to overturn a trial court's new trial order is admittedly limited, it nevertheless exists, as is expressly recognized in Federal Rule of Civil Procedure 50(c)(1), which provides that:

> "... In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed *unless the appellate court has otherwise ordered.*" (Emphasis added.)

This Court emphasized the clear meaning of this Rule in *Neely* v. *Martin K. Eby Construction Co., Inc.*, 386 U.S. 317 (1967), stating:

> "As the Advisory Committee's Note to Rule 50(c) makes clear, Rule 50(c)(1) contemplates that the appellate court will review on appeal both the grant of judgment n.o.v. and, if necessary, the trial court's conditional disposition of the motion for new trial. *This review necessarily includes the power to grant or to deny a new trial in appropriate cases.*" 386 U.S. at 323. (Emphasis added.)

Not only has this court sanctioned close appellate review of new trial orders, it has even itself engaged in such review. In *Grunenthal* v. *Long Island Railroad Co.*, 393 U.S. 156 (1968), this Court undertook a detailed analysis of the evidence supporting a trial court's denial of a new trial on evidentiary grounds and noted with approval, in the similar situation of the review of excessive awards, that:

> "All 11 courts of appeals have held that nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive." 393 U.S. at 157, n.3.

Thus, contrary to petitioners' allegations, this Court has specifically sanctioned, and even itself engaged in, limited appellate scrutiny of new trial orders. The court below was not, therefore, disobeying this Court when it reviewed the trial

court's decision; rather, it was utilizing a Constitutionally necessary power which has been sanctioned by this Court.

2. *No Constitutional issue is raised by the court of appeals' order reversing the trial court's order for a new trial.*

The issue raised by petitioners is not one of Constitutional dimensions as they would have the Court believe. On the contrary, both the courts of appeals and the commentators have recognized that appellate review of an order granting a new trial, which has overturned a jury's verdict, is a necessary protection for litigants' rights under the Seventh Amendment. This essential distinction between the review of orders which overturn a jury's verdict and the review of simple denials of new trial motions was not reached in the early decisions of this Court relied upon by petitioners, *Fairmount Glassworks* v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933) and *United States* v. *Johnson*, 327 U.S. 106 (1946), and was not even perceived to be an issue at all in such early cases as *Portman* v. *American Home Products Corp.*, 201 F.2d 847 (2d Cir. 1953), heavily relied upon by petitioners.

By contrast, this distinction has been recognized by many of the courts of appeals in recent times and has been succinctly analyzed by Professor Charles Allen Wright:

> "Review of an order granting a new trial because the verdict is against the weight of the evidence is a different matter. The older cases did not perceive the difference and often said that neither the grant nor denial was reviewable. *There is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial.* In this instance, the appellate court is not re-examining facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it." 11 C. Wright and A. Miller, *Federal Practice and Procedure*, §2819, p. 126 (1973). (Emphasis added.)

In the present case, the court of appeals simply reinstated the jury's verdict, a verdict to which, absent some grievous error by the jury, the defendant was entitled by the Seventh Amendment. Thus the reversal of the trial court was not in derogation of the Constitution but rather in support of it. As Professor Wright has recognized, *id.*, in such circumstances there exists no Constitutional question for this Court to review.

3. *The courts of appeals are in agreement that new trial orders may be reviewed on appeal using an abuse of discretion standard.*

In an effort to obtain review by this Court, petitioners have artfully painted a picture of total confusion among the courts of appeals as to the proper standard for reviewing new trial orders. In fact, the appellate courts are in almost unanimous agreement that such orders may be reviewed on appeal and may be reversed where the trial court clearly abused its discretion in evaluating the evidence.[1]

Not only are the courts of appeals in agreement that new trial orders may be reviewed using an abuse of discretion standard, many of the courts have also expressly approved the

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[1] All but two circuit courts have expressly agreed with this proposition: *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978); *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied* 364 U.S. 835 (1960); *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350 (4th Cir. 1941); *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980); *Duncan* v. *Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967); *Nanda* v. *Ford Motor Co.*, 509 F.2d 213 (7th Cir. 1974); *Fireman's Fund Insurance Co.* v. *AALCO Wrecking Company, Inc.*, 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co., Inc.*, 249 F.2d 246 (9th Cir. 1957); *Harris* v. *Quinones*, 507 F.2d 533 (10th Cir. 1974); *Taylor* v. *Washington Terminal Company*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969). The eleventh circuit has yet to rule on the question, and the second circuit, without expressly so stating, appears no longer to be following its early decision in *Portman* v. *American Home Products, Inc.*, 201 F.2d 847 (2d Cir. 1953). *See, Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965); *Bevevino* v. *Saydjari*, 574 F.2d 676, 686 nn. 29-30 (2d Cir. 1978).

logic of *Lind* v. *Schenley Industries, Inc., supra.*[2] In fact, even the second circuit is no longer strictly following its old holding in *Portman* v. *American Home Products Corp.*, 201 F.2d 847 (2d Cir. 1953), the case upon which petitioners place so much weight. In *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), that court did closely review a trial court's conditional new trial order and reversed the order after a detailed review of the evidence. This leaves no circuit court which has ever expressly disagreed with *Lind.*

While it is no doubt true, as petitioners argue, that the courts of appeals have used different verbal formulas to express exactly what actions of trial courts amount to "abuses of discretion," it is also true that the term is not one which lends itself to precise definition. Further, it is clear that the courts do agree on the basic principle that a trial court's order granting of a new trial should not be set aside unless the judge has clearly abused the discretion with which he has been entrusted. When such is the case, no useful purpose would be served by this Court's issuance of a further array of adjectives in an attempt to provide additional definition to an already well-recognized and accepted standard.

4. *Because the courts of appeals have used their power to reverse new trial orders sparingly, there is no need for supervisory intervention by this Court.*

In keeping with their articulated positions that trial courts' rulings on new trial orders should be given great deference and

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[2] *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978); *Spurlin* v. *General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976); *Duncan* v. *Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967); *Fireman's Fund Insurance Co.* v. *AALCO Wrecking Company, Inc.*, 466 F.2d 179 (8th Cir. 1972) *cert. denied*, 410 U.S. 930 (1973); *Taylor* v. *Washington Terminal Company, Inc.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969).

reversed only when discretion is clearly abused, the courts of appeals have in fact used this power exceedingly sparingly. The present case, for instance, is the only decision of the first circuit in which it has ever reversed a trial court's order granting a new trial strictly on evidentiary grounds. No circuit has reversed an order granting a new trial on evidentiary grounds more than five times since *Lind* v. *Schenley Industries, Inc., supra,* was decided in 1960.[3] Even more significant, our research has disclosed a *total* of only thirteen cases, out of the hundreds in which such an order was sought, in all the courts of appeals combined in those twenty-two years, in which such an order has been reversed.[4] The paucity of such decisions hardly amounts to a "modern trend of according little or no deference to trial judge's rulings on new trial motions," as petitioners would have us believe. Rather, it shows affirmatively the great deference which the courts of appeals still show to a trial judge's new trial order. This is not a situation which calls for reaffirmation by this Court of a principle which is being strictly adhered to by the circuit courts.

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[3] *Grove* v. *Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir. 1971); *Lewin* v. *Metropolitan Life Insurance Company*, 394 F.2d 608 (3d Cir. 1968); *Hourston* v. *Harvlan, Inc.*, 457 F.2d 1105 (3d Cir. 1972); *Thompson* v. *Trent Maritime Co. Ltd.*, 353 F.2d 632 (3d Cir. 1965); *Fassbinder* v. *Pennsylvania Railroad Company*, 322 F.2d 859 (3d Cir. 1963).

[4] In addition to those cases cited in Note 3: *Taylor* v. *Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969); *Vander Zee* v. *Karabatsos*, 589 F.2d 723 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979); *O'Neil* v. *W. R. Grace & Company*, 410 F.2d 908 (5th Cir. 1969); *Spurlin* v. *General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976); *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980); *Duncan* v. *Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967); *Fireman's Fund Insurance Co.* v. *AALCO Wrecking Company, Inc.*, 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965).

C. THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION, UNDER ANY FORMULATION OF THE STANDARD, IN GRANTING A NEW TRIAL.

Not only is the standard for review of new trial orders not one which merits this Court's consideration, the present case is not an appropriate one for any such review. Not only did the court below adhere to the standard of review which is almost universally recognized as proper, the case itself was one in which the trial judge clearly invaded the jury's province in total derogation of the Seventh Amendment right to trial by jury.

The court below paid strict attention to the traditional deference accorded a trial judge. The court did recognize that "the trial judge's discretion, although great, must be exercised with due regard to the rights of both parties to have questions which are fairly open resolved finally by the jury at a single trial." (683 F.2d at 6; petitioners' Brief, App. A at 3a.) However, the court also specifically noted the limitations on its power of review: " . . . [W]e emphasize that the district court's discretion to grant a new trial remains large, and will not be disturbed if reasonably based." (*Id.* at n.l.)

Not only did the court of appeals correctly articulate the appropriate standard of review, it found itself forced to reverse by factors which would merit reversal under any possible formulation of the abuse of discretion standard. As the court noted in its opinion, the trial court made several clear errors. First, it relied on a theory (that the administration of Halothane aggravated a pre-existing condition of viral hepatitis) which was never even presented to the jury. (683 F.2d at 8; petitioners' Brief, App. A at 6a.) Second, the trial court erroneously believed that one test, the Australian antigen test, had ruled out the possibility that Mrs. Coffran had viral hepatitis, a fact which, if true, would provide convincing support for petitioners' critical contention that Mrs. Coffran actually had Halothane-induced hepatitis. In fact, as the court

of appeals noted, the evidence at trial was *uncontradicted* that the test had no such meaning. (683 F.2d at 9; petitioners' Brief at App. 7a.) The court of appeals also noted that the trial court's reliance on the theory that Halothane aggravated pre-existing viral hepatitis was totally inconsistent and irreconcilable with its belief that the Australian antigen test had ruled out viral hepatitis (683 F.2d at 9; petitioners' Brief, App. A at 6a.)

Finally, and most critically, the court of appeals noted that the trial judge had totally omitted any consideration of a crucial link in the evidentiary chain: whether the tests which the petitioners maintained that the respondent should have performed would, if performed, have been abnormal. (683 F.2d at 10; petitioners' Brief, App. A at 10a.) The court of appeals, in contrast to the trial court, did analyze this issue and concluded that the jury could reasonably have believed the ample evidence presented by the defendant on this point. *(Id.)*

In addition to these clear and important errors, the court also noted that the trial court had chosen to totally disbelieve the testimony on these and other points of respondent's expert, Dr. Nicholas Greene, Chairman of Yale Medical School's Department of Anesthesiology, and "the witness who had done the most research on the precise issue of the causal connection between Halothane and hepatitis . . . ." (683 F.2d at 9; petitioners' Brief, App. A at 8a.) The court of appeals was extremely troubled that the trial court had found that the jury had been seriously mistaken in accepting the testimony of such an obviously well-qualified expert, (683 F.2d at 9; petitioners' Brief, App. A at 10a), and concluded that the trial court had indeed acted as a "thirteenth juror" in the case. As the court of appeals noted:

> "In the absence of special circumstances not present here, such as a vast disparity in qualifications or the presence of strong impeaching factors, we do not think it can be said that a verdict merely crediting one witness over another

witness is against the clear weight of the evidence." 683 F.2d at 11; petitioners' Brief, App. A at 11a.

Not only did the court of appeals rely on these clear errors in the trial court's opinion, it expressed grave reservations about several other critical elements of that opinion, elements which it accepted for the purposes of its opinion only because a closer review of them was not essential to its decision. Thus the court of appeals assumed, for the purposes of its opinion only:

1. that a jury finding that Mrs. Coffran did not have Halothane hepatitis, despite much evidence to the contrary, would have been against the clear weight of the evidence; (683 F.2d at 10; petitioners' Brief, App. A at 8a;)

2. that an abnormal eosinophil count, if the test had been performed, would, as the trial court believed, have resulted in use of a different anesthetic (a conclusion the court of appeals termed "speculative;") (683 F.2d at 10; petitioners' Brief, App. A at 9a;) and

3. that Mrs. Coffran was indeed sensitized to Halothane (a conclusion of the trial court which the court of appeals accepted, for the purposes of its opinion "with some doubts.") (*Id.*)

This case is therefore not one in which the decision of the court of appeals was based simply on its own balancing of the evidence without according due deference to the trial court. Rather, it was based on clear mistakes of the trial court, on critical gaps in the court's opinion, and on the trial court's obviously faulty reasoning. Such a case, where the trial court so clearly abused its discretion under any formulation of the standard of review, is not an appropriate vehicle for this Court to reassess that standard.

D. CONCLUSION

For the reasons stated, the Respondent, Hitchcock Clinic, Inc., respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A (Petitioners' Brief to the Court of Appeals)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1090

MARION V. COFFRAN and CHARLES W. COFFRAN
Plaintiffs, Appellees

v.

HITCHCOCK CLINIC, INC.
Defendant, Appellant

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR PLAINTIFFS, APPELLEES

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STATEMENT OF THE ISSUE

I. WHETHER THE TRIAL COURT, HAVING REVIEWED ALL THE EVIDENCE, ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, DENYING THEIR MOTION FOR NEW TRIAL AS TO ONE DEFENDANT AND GRANTING THEIR MOTION FOR NEW TRIAL AS TO THE OTHER DEFENDANT UPON THE GROUNDS THAT THE VERDICT WAS SERIOUSLY ERRONEOUS, CONTRARY TO THE CLEAR WEIGHT OF THE EVIDENCE AND WOULD RESULT IN A GRAVE MISCARRIAGE OF JUSTICE.

STATEMENT OF THE CASE

This is an appeal by the defendant from an Order of the Trial Court dated February 13, 1979, in which the trial judge granted plaintiffs' motion for new trial in a medical negligence case as to one defendant, while denying the same motion as to the other defendant in addition to denying a motion for judgment notwithstanding the verdict as to both defendants.

The plaintiffs, Marion and Charles Coffran, of Windsor, Vermont, filed a complaint in the United States District Court for the District of New Hampshire on September 30, 1975. The action claimed that the defendants, Mary Hitchcock Memorial Hospital and the Hitchcock Clinic, Inc., both of Hanover, New Hampshire, failed to exercise reasonable care in their diagnosis and treatment of Marion Coffran while she was hospitalized on two occasions in April and June of 1970. Jurisdiction for the action rested on diversity of citizenship and the statutory amount in controversy. (Appendix, 2-4)

The case was tried to a jury for 12 days beginning November 20, 1978, the Honorable Herbert N. Maletz, Judge, United States Customs Court sitting by designation pursuant to 28 U.S.C. §293(b), presiding. There were 11 volumes of trial transcript covering almost 1,700 pages of testimony, argument and jury charge. There were 15 witnesses and 51 exhibits. On December 8, 1978, the jury returned verdicts for both defendants and on December 11, 1978, Judge Maletz ordered judgment for the defendants. (Appendix, 10-11)

Plaintiffs filed a Motion for Judgment Notwithstanding the Verdict and Motion for New Trial in the Alternative on December 15, 1978. (Appendix, 12-15) Judge Maletz granted plaintiffs' Motion for New Trial as to defendant Hitchcock Clinic, Inc., and denied plaintiffs' Motion for New Trial as to defendant Mary Hitchcock Memorial Hospital and denied plaintiffs' Motion for Judgment Notwithstanding the Verdict as

to both defendants in an Order and Opinion dated February 13, 1979. (Appendix, 17-30)

The second trial of this action commenced on November 20, 1979 with the Honorable Martin F. Loughlin, United States District Judge for the District of New Hampshire, presiding. The second trial concluded on November 30, 1979, with the jury awarding verdicts in the amount of $284,500.00 for Marion Coffran and in the amount of $228,500.00 for Charles Coffran. The Court ordered judgment for the plaintiffs on December 4, 1979. (Appendix, 31-32)

Defendant Hitchcock Clinic, Inc. filed a Motion to Set Aside the Verdicts, for Judgment Notwithstanding the Verdicts, and in the Alternative for a New Trial on December 3, 1979. (Appendix, 33-34) The plaintiffs seasonably objected to this motion on December 7, 1979. (Appendix, 36-38) The Court denied this Motion on January 11, 1980. (Appendix, 39)

STATEMENT OF THE FACTS

Prior Medical History

Prior to her admission to Mary Hitchcock Memorial Hospital on April 14, 1970 for surgical repair of a right inguinal hernia, Mrs. Marion Coffran had been admitted to the hospital in 1960, at which time she gave birth to twins. Again in 1964 she was admitted for a vein stripping operation. The 1964 operation was Mrs. Coffran's first exposure to halothane. (Bricker, 26) Mrs. Coffran had a chronic dermatitis condition over her left ankle and an allergy to Benzocaine, which was noted in her April 14, 1970 admission history. (Appendix, 55-56) Mrs. Coffran suffered no obvious ill effects from that exposure, although she had an elevated temperature and a 17% Eosinophil count prior to the exposure, which were explained by an extensive skin lesion. (B. Greene, 872-873)

The Evidence Concerning Halothane

The use of halothane as a general anesthetic gained universal popularity subsequent to its introduction in this country in approximately 1959. (Sy, 1653) The widespread use of this anesthetic agent also touched off a running controversy in medical journals concerning its potential for causing severe and sometimes fatal liver damage. (Bricker, 63) Throughout the 1960's, the theory was articulated that halothane had the capacity to cause an allergic reaction or a hypersensitivity condition, which made multiple administrations potentially dangerous to certain patients. (McCleery, 674) The manufacturer of halothane, Ayerst Laboratory, included an insert with its product between 1968 and 1970 which warned that fatal massive hepatic necrosis or cholestatic jaundice were possible adverse reactions to the administration of halothane. The manufacturer further warned of repeat administrations of halothane when the previous exposure was followed by fever and jaundice or unexplained post-operative fever. (B. Greene, 797-799, Pl. Ex. 25)

Mrs. Coffran's present treating physician, Doctor Jack McCleery, a gastroenterologist, acknowledged the existence of halothane hepatitis as a medical entity and testified that repeat administrations of halothane in April and June, 1970 were the probable cause of her permanent liver damage. (McCleery, 381, 663) Doctor Nicholas Greene, defendant's expert, refused to acknowledge the existence of halothane hepatitis because it had not been proven to his satisfaction as a medical certainty. (N. Green, 999, 1131)

Halothane hepatitis is a clinical syndrome and is best identified by the existence of certain "signs or markers" of sensitization. (B. Greene, 750-751) The medical literature indicated that (1) obese (2) females (3) over forty years of age with a (4) history of allergy and about to undergo (5) major surgery in a (6) lengthy operation were the patients potentially most susceptible to halothane sensitization. (B. Greene, 750) Clinical indicators of halothane hepatitis were thought to be unexplained fever, eosinophilia and rashes or other evidence of drug allergies. (N. Greene, 1122-1123; B. Greene, 742, 755) Because of the potential risks of halothane sensitization, identification of any symptoms which suggest the patient is feeling below par following a prior exposure to halothane is important. (McCleery, 279-280)

Although the medical literature in the 1960's was replete with articles discussing the halothane hepatitis controversy, all the experts agreed that at the time of Marion Coffran's admissions in 1970 there existed no pre-operative test which could rule out her sensitivity to halothane. (Sy, 1617, 1679; B. Greene, 800, 894; N. Greene, 965) The lack of determinative tests to rule out halothane sensitivity therefore required that particular care be paid to any signs or markers indicating potential sensitivity in order to exclude the possibility of a previously unrecognized reaction to halothane. (Bricker at 191) The experts disagreed on the relative effectiveness of particular markers in forecasting adverse halothane reactions.

Doctor Barnett Greene, for example, testified that an elevated eosinophilia ("EOS") count or an abnormal erythrocyte sedimentation rate ("ESR") were markers of sensitivity. (B. Greene, 731, 735, 742, 746, 933) Eosinophils are a particular kind of white cell and a rise in eosinophils indicates there is some reaction of the body to a foreign substance or a toxic reaction. (Bricker, 20) Doctor Bricker testified that the normal range of eosinophils is 1-3%. (Bricker, 173) Doctor Nicholas Greene testified that the normal range of eosinophils is 0 to 17%, although he later stated that a 5% count, while normal, is at the high end of the normal range. (N. Greene, 1000-1002) Both Doctor Nicholas Greene and Doctor Barnett Greene agreed that an ESR finding of 43 was abnormal, but Doctor Nicholas Greene and Doctor McCleery testified these lab results, in and of themselves, were non-specific signs of halothane sensitivity. (B. Greene, 745, 746; N. Greene, 1106; McCleery, 529) An elevated sedimentation rate is also indicative of something wrong with the patient which demands further investigation. (B. Greene, 746; Bricker, 84)

Doctor Barnett Greene, Doctor McCleery, and Doctor Bricker, supported in their testimony by numerous medical articles regarding the halothane sensitization process, all testified that repeat administrations of halothane tended to increase the risks of an adverse reaction and subsequent hepatic damage. (Bricker, 191; B. Greene, 751, 752; McCleery, 676) Even Doctor Nicholas Greene admitted that recognized authorities in the field and notable studies, including the National Halothane Study, asserted that halothane hepatitis is most probably the result of a sensitization process, that repeat exposures should be avoided if possible, that thorough investigation is necessary in order to rule out a previous halothane reaction, that halothane sensitivity may not be clinically evident and may persist for long periods of time. (N. Greene, 1120-1123, 1135, 1147, 1150) Both Doctor Barnett Greene and Doctor McCleery agreed that there was no data to support any kind of hard and

fast rule regarding a proper interval of time between administrations of halothane because once a person became sensitized to halothane, there remained a lifelong risk of an adverse and permanently damaging reaction. (B. Greene, 919; McCleery, 582-584)

It was undisputed that Doctor Walter P. Sy, the anesthesiologist who selected halothane for both hernia repair operations in 1970 and also administered halothane at the June 5, 1970 operation, was aware of the potential risks of repeat exposures to halothane and recognized the possibility of a sensitization process. (N. Greene, 1108; Sy, 1567, 1673; Appendix, 54, 65)

The April 15, 1970 Operation

Marion Coffran had a complete blood count and urinalysis in the Outpatient Department at Mary Hitchcock Memorial Hospital which had been ordered by her surgeon, Doctor Mosenthal, on April 9, 1970. (Bricker, 22-23) She entered the hospital on April 14, 1970 in order to have an inguinal hernia repair on April 15, 1970. This operation was an elective major surgery. (Bricker, 43, 68)

Prior to surgery on April 14, 1970, Doctor Sy reviewed Mrs. Coffran's medical history and prepared his anesthesia note in which he suggested repeat administration of "halothane *pending* workup and lab." (Bricker, 32) Doctor Sy also noted her allergy to "caines." Yet, no further workup or lab tests were performed prior to the surgery and halothane exposure. (Bricker, 33) An ESR test was also ordered "pre-op stat" on the morning of April 15, 1970; but the results, which were abnormal, were not reported until the morning after her surgery. (B. Greene, 744-746) No attempt was made to follow up the 5% EOS count or the abnormal ESR subsequent to their discovery. (B. Greene, 746-747, 751-752)

On April 17, 1970, Mrs. Coffran exhibited an elevated post-operative temperature of 100.8 degrees. (Bricker, 37) The fever was diagnosed as pneumonostasis, a lung condition, treated and subsequently subsided. (Bricker, 37, 42) Although Mrs. Coffran's condition was diagnosed as pneumonostasis, no further testing was performed to rule out an adverse halothane reaction. (Bricker, 42; B. Greene, 882) Even Doctor Nicholas Greene testified that, when he first reviewed the medical records, he indicated that the elevated temperature of April 17, 1970 had not been explained by physical exam. (N. Greene, 1169) The medical literature identified "unexplained post-operative fever" as an important warning sign of halothane sensitivity. (N. Greene, 1135)

The June 5, 1970 Operation

Marion Coffran was readmitted to the hospital on June 4, 1970 for repair of a right femoral hernia, which had reoccurred notwithstanding the April surgery. Although seven weeks had passed since her last operation, no pre-operative blood tests or lab work other than urinalysis were performed prior to another administration of halothane on June 5, 1970. (Bricker, 47) Doctor Walter Sy, who ordered halothane for the June 5, 1970 operation, testified:

> Every patient coming for surgery must have what is called a complete blood count, so-called CBC, in which the various cells, red cells, white cells, platelet cells are looked at under the microscope. Their amount is measured and that is recorded. In addition, an analysis I mentioned of urine is made. These two things are required by the laws of the hospital for the practice of good surgery and medicine. (Sy, 1687)

Included in any CBC is an EOS count. (Sy, 1688) Every expert witness agreed that the failure to perform pre-operative blood tests or lab work prior to the June 5, 1970 surgery failed to comply with reasonable standards of medical care and treat-

ment. (N. Greene, 1057; B. Greene, 802-803; Bricker, 45; McCleery, 342) Doctor Nicholas Greene, however, testified that the failure to perform any pre-operative testing on June 4, 1970 made no difference in the outcome of the case. (N. Greene, 1004-1005)

Doctors Bricker, McCleery, and Barnett Greene all testified that Doctor Sy's anesthesia note of June 4, 1970 was inaccurate insofar as he wrote that no post-operative fever had followed the prior administrations of halothane. (B. Greene, 757; Bricker, 94; McCleery, 363, 370-371) Following the June 5, 1970 exposure to halothane, Mrs. Coffran ran a fever, which was unexplained in the records. All the doctors agreed that the post-operative fevers in June could be characterized as spikes. (N. Greene, 994; McCleery, 384-386; Sy, 1674-75; Bricker, 105, 125; B. Greene, 773) Whether the spikes displayed the characteristics of halothane spikes was disputed, although Doctor Sy later noted that the halothane reaction was all so atypical. (N. Greene, 996; Sy, 1675; McCleery 367; B. Greene, 773)

Marion Coffran's Post-Operative Hepatitis

Marion Coffran returned to the hospital on June 18, 1970, displaying obvious signs of jaundice. Doctor Mosenthal's admission note diagnosed her condition as probable hepatitis, possibly linked to halothane exposure. (Bricker, 98) The diagnosis was subsequently changed to halothane hepatitis. (McCleery, 321) The history taken at the time of her June 18, 1970 admission identified all the classic symptoms of hepatitis. (McCleery, 325-326) An EOS count taken on July 7, 1970, prior to Mrs. Coffran's discharge from the hospital and after the hepatitis had fully manifested itself, registered 7%. (B. Greene, 812) The fourteen physicians who examined or treated Marion Coffran for hepatitis all agreed, based on their combined judgment, experience and background, that Mrs. Coffran was

more probably than not suffering from halothane hepatitis. (McCleery, 664) Even Doctor Sy concurred with the diagnosis. (Sy, 1675)

Only Doctor Nicholas Greene, who never had the benefit of treating or examining Mrs. Coffran and was unaware of the full range of testing performed subsequent to Mrs. Coffran's June 18, 1970 admission in an attempt to rule out diagnoses other than halothane hepatitis, disputed the diagnosis of halothane hepatitis. (N. Greene, 996, 1015-1016) No other reasoned explanation for Mrs. Coffran's hepatic condition has been found in the years since its onset. (McCleery, 508, 516)

ARGUMENT

I. THE TRIAL COURT EXERCISED ITS SOUND DISCRETION IN GRANTING PLAINTIFFS' MOTION FOR NEW TRIAL ONLY AS TO DEFENDANT HITCHCOCK CLINIC, INC. ON THE GROUNDS THAT THE JURY VERDICT WAS SERIOUSLY ERRONEOUS, CONTRARY TO THE CLEAR WEIGHT OF THE EVIDENCE, AND CONSTITUTED A GRAVE MISCARRIAGE OF JUSTICE.

A. The Trial judge is obligated to Set aside Verdicts Which are Against the Great Weight of the Evidence

The power of a district court judge to grant a new trial on the ground that the jury's verdict was against the weight of the evidence is well established. *Wright* v. *Miller,* Federal Practice and Procedure; Civil §2806, pp. 44-50. Rule 59(a) of the Federal Rules of Civil Procedure provides as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in action at law in the Courts of the United States.

This rule recognizes the common law principle that it is the duty of a trial judge who is not satisfied with a jury's verdict to set it aside and grant a new trial; the Trial Court has the obligation to see to it that justice is done in each case. *Klein* v. *Auto Owners, Insurance Co.,* 39 F.R.D. 24 (D.Minn. 1965).

A motion for new trial is addressed to the sound discretion of the Trial Court. *Borras* v. *Sea-Land Service, Inc.,* 586 F.2d 881 (1st Cir. 1978). In ruling upon a motion for a new trial, the judge is free, if not compelled, to weigh the probative value of the evidence, for it is

> . . . the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against

> the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice. *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 886, (1st Cir. 1978), citing *Aetna Casualty and Surety Co.* v. *Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941).

The scope of the trial judge's discretion is not limitless. The trial judge must balance the respect owed to the findings of the jury as the triers of fact with his overriding obligation to insure that justice is achieved. In this regard, the trial judge cannot act merely as a thirteenth juror and set aside the verdict because he would have reached a different result, nor can he set aside the verdict because he believes a contrary result would be more reasonable. *Id.* at 887. Rather he should not set aside the verdict

> . . . unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not. *Id.* at 886, citing 6 A J. Moore, Moore's Federal Practice, §59-08[5], at 59-160 to 161.

Implicit in the trial judge's power to order new trials is his freedom to weigh all the evidence and, in his overriding obligation to prevent unjust jury verdicts lies the authority to set aside a verdict even though there may be substantial evidence to support it. *Harris* v. *Quinones*, 507 F.2d 533 (10th Cir. 1974). *Harris* involved an automobile-motorcycle collision at an intersection. The testimony tended to show that the defendant, although blinded by the sun, proceeded out into an intersection where she collided with the plaintiff. The jury returned a verdict for the defendant presumably on the theory that the plaintiff should have seen and avoided the defendant although the evidence was to the contrary. The Trial Court granted plaintiff's motion for a new trial on the grounds that the verdict was against the decided weight of the evidence. Plaintiff recovered a jury verdict at the conclusion of the second trial.

The reviewing court upheld the Trial Court's discretionary ruling which had been based on his conviction that the jury had ignored uncontroverted evidence of defendant's negligence and had relied upon evidence of little or no credible weight in finding plaintiff contributorily negligent.

In *Guest* v. *Breedin,* 257 F.2d 22 (4th Cir. 1958), the Trial Court in this medical negligence case erroneously granted judgment n.o.v. and a new trial in the alternative. The expert testimony was conflicting on the issue of the cause of death while the decedent was undergoing surgery. On appeal, the Court held that granting a new trial was not an abuse of discretion even though there was sufficient evidence to defeat the judgement n.o.v.

The trial judge's obligation to review all the evidence distinguishes his consideration of a motion for new trial from a motion for judgment notwithstanding the verdict, wherein he is obliged to take the view of the evidence most favorable to the party against whom the motion is made, together with the benefit of all inferences reasonably drawn therefrom, and determine whether the evidence is legally sufficient to warrant taking the case to the jury. 6A, Moore's Federal Practice, §59-08[5], at 59-152 to 153.

Here, the Trial Court in its Order of February 13, 1979 recognized that sufficient evidence existed to take the case to the jury as to both defendants, but concluded after reviewing all the evidence that the verdict as to defendant Hitchcock Clinic, Inc. was seriously erroneous and a miscarriage of justice.

B. *The Trial Court's Decision to Grant a New Trial Must be Sustained in the Absence of an Abuse of Discretion*

The Trial Court's granting of a motion for new trial must be sustained on appeal unless there has been an abuse of discretion. *Borras* v. *Sea-Land Services, Inc.,* 586 F.2d at 887. The granting of a motion for new trial in a diversity action on

the ground that the verdict is against the great weight of the evidence is governed by federal rather than state law. *Gebhart* v. *Wilson Freight Forwarding Co.*, 348 F.2d 129 (3rd Cir. 1965).

The meaning of the phrase "abuse of discretion" has long evaded meaningful construction. The definition most often quoted comes from *In re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954), wherein Justice Magruder stated:

> Abuse of discretion is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

The Court in *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir.), *cert. denied*, 364 U.S. 835, 81 S.Ct. 58, L.Ed.2d 60 (1960), discussed the relevant factors to be weighed by the Trial Court. In his duty to avoid miscarriages of justice,

> [T]he trial . . . should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts, and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. *Id.* at 89, citing 6A Moore's Federal Practice, §59-08[5], at 59-160.

In *Lind* the plaintiff brought a contract action against his employer for compensation allegedly due him pursuant to a written memorandum and oral conversations. The jury found for the plaintiff after the court denied defendant's motion for directed verdict. Defendant moved for judgment notwithstanding the verdict and in the alternative for a new trial. The Trial Court set aside the jury's verdict and entered a judgment n.o.v. for defendant on the grounds that the plaintiff had failed to

prove that representatives of the defendant had apparent authority to offer the alleged contract terms and that the terms of the alleged contract were sufficiently definite and certain to be enforceable. The Court held that the trial judge erred in finding that insufficient evidence was introduced to sustain the jury verdict.

The trial judge also granted the alternative motion for new trial because it found the jury's verdict contrary to the weight of the evidence, contrary to law and the result of evidentiary error. Having disposed of the later two grounds, the Court considered the basis of the claim that the verdict was against the weight of the evidence, recognizing at the outset that "special or unusual circumstances" might warrant reversal of the Court's exercise of discretion. *Id.* at 88.

The Court thereupon fashioned a new rule governing review of cases where a new trial is granted because the verdict is against the weight of the evidence as opposed to cases where a new trial is granted because some "undesirable or pernicious" element has been introduced into the trial such as evidence improperly admitted or newly discovered evidence:

> ... where no undesirable or pernicious element has occurred ... It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case when a new trial is granted because of some undesirable or pernicious influence intruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial. *Id.* at 90.

The Court further recognized such scrutiny must nevertheless allow the trial judge greater discretion to closely evaluate the verdicts

> [W]here a trial is long and complicated and deals with a subject matter not lying within the common knowledge of the jurors. *Id.* at 90.

The Court held, therefore, that because the subject matter was simple and involved "ordinary commercial practices" familiar to most laymen, the case turned upon the veracity of the witnesses and thus, in the absence of extensive expert testimony and complex issues, the Court concluded that the trial judge had abused its discretion by substituting its judgment on the controlling issue of credibility for that of the jury.

In this same regard, this Court in *Rios* v. *Empresas Lineas Maritimas Argentinas,* 575 F.2d 986 (1st Cir. 1978), stated its support for the proposition that where a trial judge is faced with a motion for new trial in which a party claims that the verdict is against the weight of the evidence, but urges in support thereof only that the testimony is conflicting, particular care should be exercised in order to avoid usurping the jury's function. The Court implied that the trial judge is nonetheless obligated to review all the evidence in the discharge of his duty to oversee the jury's verdict. *Id.* at 991. *Rios,* therefore, supports a trial judge's independent exercise of discretion so long as it is not unreasonable.

In this case, the trial was lengthy and the issues were complex, involving extensive reliance on medical literature and competing theories about the etiology of a rare medical condition which remains unsettled even among recognized medical authorities. This case didn't turn simply on the credibility of two conflicting interpretations of the facts but rather upon the probability, not the medical certainty, that the failure of the defendant to conform to reasonable standards of medical practice resulted in undisputed damage to the plaintiffs. Under these circumstances and in light of his opportunity to evaluate the overall conduct of the trial, the trial judge's reasoned decision in this case is not so clearly erroneous as to warrant setting it aside.

Contrary to strong common law principle, defendant's counsel relies upon *Spurlin* v. *General Motors Corporation,* 528 F.2d 612 (5th Cir. 1976) in support of his contention that this

Court is obliged to apply a constitutional standard of strict scrutiny in order to preserve the integrity of the Seventh Amendment. What counsel fails to acknowledge, however, is that the right to jury trial guaranteed by the Seventh Amendment necessarily includes the trial judge's common law responsibility to prevent miscarriages of justice and to set aside unjust verdicts. This inherent power of the trial judge is generally regarded as a safeguard of the right to trial and not a derogation of that right. *Aetna Casualty and Surety Co.* v. *Yeatts* at 353. See also 13 Stan. L. Rev. 383, 387, 1961.

The *Spurlin* case involved consolidated wrongful death and personal injury actions brought against the manufacturer of a 1965 school bus which alleged that the failure of the bus's brakes and the resulting crash was the result of the negligent design of the braking system. The jury returned a substantial verdict for the plaintiff, which the Court nullified by granting defendant's motion for judgment n.o.v. and for a new trial in the alternative on the ground that the verdict was not supported by the evidence.

The Court examined the legal sufficiency of the evidence in a light most favorable to the plaintiff and concluded that ample evidence existed to warrant taking the case to the jury and therefore reversed the trial court's grant of judgment n.o.v.

Turning to the propriety of the Trial Court's order on the alternative motion for new trial, the Court concluded that the evidence was at most conflicting on the issues of negligent design and proximate cause and to allow the Trial Court's decision to stand under these circumstances would violate the settled rule that a court is not free to set aside a verdict merely because the judge feels that another result is more reasonable. The Trial Court's ruling was further objectionable becuase, unlike this case, the issues presented to the jury were relatively simple and the technical data was not overwhelming.

Defense counsel claims that the trial judge in this case abused his discretion in three particulars. The first ground is that the trial judge unjustifiably concluded that the failure to perform the requisite pre-operative testing prior to the June 5, 1980 administration of halothane caused or contributed to the resulting hepatitis. Counsel's position neglects to recognize the very theory of halothane sensitization.

The evidence was undisputed that an ongoing controversy regarding halothane hepatitis was a topic of intense debate during the 1960's. Furthermore, the lack of a definitive pre-operative test to rule out halothane sensitivity only increased the need to fully investigate any signs or markers which could indicate an adverse reaction to halothane. Where, as here, the plaintiff was undergoing elective surgery for a condition from which she had been suffering for over 20 years, (Appendix, 54), and she satisfied numerous criteria for potential sensitivity (B. Greene, 750), the risk of adverse results far outweighed the need for less than thorough pre-operative testing. The failure to provide Marion Coffran that pre-operative care foreclosed the opportunity to discover signs of sensitivity prior to her third exposure to halothane. In light of the evidence introduced at trial, the trial judge's conclusion was logical, reasonable and supported by the overwhelming weight of the evidence.

Secondly, counsel contends that the trial judge's reference to a 7% EOS count lacks any support in the record. The undisputed testimony of Doctor Barnett Greene was that Marion Coffran displayed a 7% EOS count on July 7, 1970, the day before she was discharged from the hospital following her June 18, 1970 admission for jaundice. (B. Greene, 812) This test was taken at a time after her symptoms of hepatitis had become clinically obvious. It was therefore not unreasonable for the trial judge to conclude that a 7% reading was clearly indicative of hypersensitivity. The 7% reading became all the more probative in light of the differing testimony regarding not

only normal EOS levels, but whether an EOS count could be indicative of sensitivity. (N. Greene, 1001; Bricker, 191) Even assuming for the sake of argument that the trial judge improperly considered this evidence in concluding that eosinophilia may indicate drug sensitivity, such erroneous reliance on just one of several grounds constituting the court's order is not an abuse of discretion which warrants reversal. *Hanson* v. *Shell Oil,* 541 F.2d 1352, 1358 (9th Cir.) *cert. denied* 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977).

Finally, counsel claims that the trial judge abused its discretion in concluding that the June exposure aggravated a pre-existing hepatic condition on the ground no such probative was introduced. The theory of a pre-existing condition was introduced by defendant's own expert witness, Doctor Nicholas Greene. Doctor Bricker also commented upon the probabilities of a pre-existing viral hepatitis condition causing Mrs. Coffran's resulting injuries. (Bricker, 194) Plaintiffs pursued this alternative theory throughout trial and in their closing arguments. Proximate cause is not defeated merely because direct evidence of the cause of plaintiff's subsequent injuries is not available so long as causation may be found by reasonable inference. *Vezina* v. *Amoskeag Realty Co.,* 110 N.H. 66, 260 A.2d 115 (1969). In *Vezina,* plaintiff, a tenant in defendant's rooming house, fell in bathroom on the premises. Plaintiff alleged several different conditions were responsible for her fall. The Court rejected defendant's argument that since plaintiff was unable to describe the cause of her fall, a jury shouldn't be able to speculate among a number of possible causes. *Id.* at 68.

In this case, having introduced the claim of a pre-existing hepatic condition, defendant cannot claim an abuse of discretion because the trial judge considered all the evidence in the records capable of reasonable inference. The trial judge's analysis, to the contrary, represents a logical and conscientious attempt to reconcile complicated issues, competing testimony

and, above all, to insure a just verdict. The trial judge faithfully discharged his obligations; his grant of a new trial only as to defendant Hitchcock Clinic, Inc. is not such a clear error of judgment that it can be characterized as an abuse of discretion.

CONCLUSION

For the aforementioned reasons, the plaintiffs, Charles and Marion Coffran respectfully request this Court uphold the February 13, 1979 decision of the Court below.

Respectfully submitted,

CHARLES AND MARION COFFRAN,
By Their Attorneys,
BROWN AND NIXON PROFESSIONAL ASSOCIATION

By_____
Frank E. Kenison

Dated: December 14, 1981

CERTIFICATION

I hereby certify that a copy of the within Brief for the Plaintiffs, Appellees was this day mailed, postage prepaid, to Michael P. Lehman, Esq.

_____
Frank E. Kenison

No. 82-694

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARION V. COFFRAN AND CHARLES W. COFFRAN,
Petitioners,

v.

HITCHCOCK CLINIC, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR THE PETITIONER

In an effort to persuade this Court that the questions presented do not justify the grant of certiorari, respondent has misrepresented the thrust of the Petition and glossed over the serious institutional concerns presented by an expansive exercise of appellate review. Respondent would have this Court believe that the strength of the Petition rests on the argument that *any* appellate review of a new trial order is impermissible. While traditional teaching did indeed hold that a trial judge's ruling on a new trial motion based on the claim that the verdict was against the weight of the evidence was not reviewable by an appellate court, the Petition does not rest on the continued validity of this rule. Because the Brief in Opposition attempts to obfuscate the questions presented, a clarification of the contentions presented in the Petition may prove useful.

The decisions of this Court establish that "[t]he authority to grant a new trial . . . is confided *almost entirely* to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (emphasis added). This Court has emphasized that, in reviewing such decisions, "[a]ppellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (Brandeis, J.). Recently, however, some federal courts of appeals have, *as they have freely admitted*, departed from the view that the trial judge's discretion in ruling on new trial motions is very broad. As discussed in the Petition, the reasons proffered for expanding the scope of appellate review cannot withstand scrutiny. And, the adverse consequences which flow from an overly expansive exercise of appellate review are, petitioners submit, unacceptable.[1]

A. This Court should grant certiorari to control an undue expansion of review by the courts of appeals.

Respondent does not contest the statements in the Petition that the court below, in reviewing an order granting a motion for a new trial, followed the "modern trend" which allows expanded appellate scrutiny, and that the result of this "modern trend" is to diminish the discretion traditionally accorded the trial judge as to such orders. The Petition and the Brief in Opposition disagree as to whether this development is salutary.

The discretion traditionally accorded the trial judge's review of new trial orders was based upon historical experience and a realistic assessment of the relative competence of the trial

[1] The Brief in Opposition contends (Br. in Opp. 1) that the issue presented by the Petition was not raised in the court below. This is quite unfounded. The contention made by the petitioners in the court of appeals was that the trial court had not abused its discretion in granting a new trial. (See Brief printed in Appendix to Brief in Opposition.) Petitioners emphasized that this standard is very narrow. What the court of appeals did was to follow the "modern trend," review and weigh the evidence *itself*, and then substitute *its* view of the weight of the evidence for that of the trial judge. The correctness of *this* scope of review is the issue raised in the Petition, and that is precisely the issue which was raised before the court of appeals.

judge and the court of appeals. At common law, the trial judge's exercise of his *duty*, in appropriate cases, to grant a new trial was not considered to be "in derogation of the right of trial by jury but. . . [was viewed as] one of the historic safeguards of that right." *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)(Parker, J.). In exercising a power that has traditionally been regarded as an essential attribute of trial by jury, a trial judge is required to make a decision which is, by its very nature, highly discretionary. The trial judge, who hears the witnesses and plays the closest and most vital judicial role in the fact-finding process, is in a unique position to exercise the professional judgment called for by a new trial motion based on the ground that the verdict was against the clear weight of the evidence.[2] Therefore, a trial judge's ruling on such a motion would only be reversed "in the most exceptional circumstances." *Id.* at 354.

The decision below illustrates the soundness of the traditional rule. The court of appeals did state that it would only reverse if it found an abuse of discretion. The court emphasized, however, that it subscribed to the "modern trend" which "is away from earlier decisions that the trial judge's discretion is virtually unlimited." (683 F.2d at 6; Pet. App. 3a.) Moreover, the course actually followed by the court of appeals is more instructive than its recitation of the standard of review. The court engaged in a detailed weighing of the evidence and made its own credibility determinations. The court ignored the well-recognized principle that increased deference to the district judge is required in complex cases.[3] Finally, the court of

[2] As the record indicates, there can be no doubt that the trial judge *did* exercise his professional judgment. He granted only *one* of petitioners' post-trial motions, ordering a new trial, not a j.n.o.v., as to *one* of the defendants on the ground that the verdict was against the clear weight of the evidence. After careful consideration, the trial judge rejected the testimony of the defendants' expert (upon whom the court of appeals relied).

[3] Although the First Circuit purported to rely on *Lind v. Schenley Industries Inc.*, 278 F.2d 78 (3d Cir. 196[illegible]), *cert. denied*, 364 U.S. 835, to justify its expansive standard of review, a careful reading of *Lind* and of nearly every other appellate decision adopting the "modern trend" indicates

(footnote continues)

appeals compartmentalized the proof and based its holding on the insufficiency of the evidence on one element of petitioners' case.

The First Circuit's approach turns the traditional principles governing appellate review of new trial orders on their head. The court's approach necessarily impinges on the *discretion* of the trial judge to grant a new trial motion when he—in the exercise of his professional *judgment*—determines that the case should be reconsidered by a second jury. This expanded scope of appellate review raises serious institutional concerns. It disrupts the balance between trial and appellate courts and, among other things, encourages a proliferation of appeals.[4]

Properly understood, the appellate role, when reviewing the grant of a motion for a new trial, is to "see whether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict." *Lind v. Schenley Industries Inc.*, 278 F.2d 79, 91 (3d Cir. 1960) (Hastie and Kalodner, JJ., dissenting), *cert. denied*, 364 U.S. 835. This view of the appellate function recognizes that the trial judge, when he determines that justice requires *reconsideration* by a second jury, does not *substitute* his view of the evidence for that of the first jury. The grant of a motion for a new trial does not result in the entry of judgment for the verdict-loser. "Thus, the essential institution of jury trial is respected and an expedient middle ground is maintained between the absence of any control over a jury's verdict on conflicting evidence, on the one hand, and judicial usurpation of the fact finding function, on the other." *Lind, supra*, at 91 (Hastie and Kalodner, JJ., dissenting).

(footnote continued)

that the expansive standard of review, regardless of its validity, was erroneously applied by the First Circuit in this case, because of the case's manifest complexity and the existence of possible jury confusion. The First Circuit's reversal in *this* instance highlights petitioners' concern that the "modern trend" permits a scope of review unwarranted and unsanctioned by the decisions of this Court.

[4] Regardless of the number of times new trial orders have actually been reversed, the detailed review engaged in by the First Circuit will undoubtedly encourage future appeals of *every* new trial order issued on the basis of the weight of the evidence.

This Court's consideration is necessary in order to prevent the undue expansion of appellate power and to preserve the traditional role of the trial judge as an "historic safeguard" of the right to trial by jury.

B. This Court should clarify the appropriate standard of appellate review of new trial orders.

Respondent maintains that there is no confusion in the courts of appeals as to the proper standard of review of orders granting new trial motions. Both the Brief in Opposition and the case law, however, indicate the fallacy of this assertion.

For example, in discussing the court of appeals' detailed review of the evidence on whether a certain test would have revealed an abnormal eosinophil count, respondent states: "[t]he court of appeals . . . concluded that the jury could reasonably have believed the ample evidence presented by the defendant on this point." (Br. in Opp. 9.) Contrary to respondent's suggestion, the conclusion that a reasonable jury could have found in respondent's favor on this point does not dispose of the new trial issue. Although there should be no reason for uncertainty, respondent's suggestion appears to repeat the error of confusing the standard for a directed verdict (or j.n.o.v.) with the standard which governs the granting of new trial motions.

Similarly, in *Williams v. City of Valdosta*, 689 F.2d 964 (11th Cir. 1982), the court of appeals, after noting the confusion which exists as to whether a district judge can consider the credibility of witnesses in ruling on a new trial motion, also appears to have confused the directed verdict or j.n.o.v. standard with the standard governing motions for a new trial. In reversing the grant of a motion for a new trial, the court stated: "Apparently, there is disagreement over whether the trial judge is permitted to make credibility choices when weighing all the evidence . . . . In our view, the authorities suggest that the trial judge should not substitute his own credibility choices and inferences for the reasonable credibility choices and inferences made by the jury." *Id.* at 973 n.7. Although this statement accurately describes the district judge's role in ruling on a

j.n.o.v. motion, it does not, and should not, apply to a new trial motion. Any distinction between the two would otherwise be meaningless.

Although a trial judge is not to act as a 13th juror, he is required to weigh the evidence, and a motion for a new trial can be granted "even though there may be substantial evidence which would prevent the direction of a verdict." *Aetna Casualty,* 122 F.2d at 352-53. The confusion which exists can only serve to undermine the trial judge's discretion to grant a new trial motion when—in the exercise of his judicial function—he believes that justice requires that a case be reconsidered by a second jury.

CONCLUSION

This Court should review the "modern trend" towards an increased scope of appellate review of new trial orders. This Court's consideration is necessary in order to prevent the undue expansion of appellate power and to clarify the appropriate scope of appellate review.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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